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UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

DECISIONS OF THE SECRETARY OF AGRICULTURE

ISSUED UNDER THE

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(Including Court Decisions)

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PREFATORY NOTE

The purpose of this official publication is to make available to the public, in an orderly and accessible form, decisions and orders issued by the Secretary of Agriculture, or those officers authorized by law to act in his stead, under laws administered by the Department of Agriculture.

The decisions published herein result from formal adjudicatory administrative proceedings instituted by the Department, under designated statutes and regulations, after notice and hearing or opportunity for a hearing. This publication does not include rules and regulations which are required to be published in the Federal Register.

Consent decisions entered subsequent to December 31, 1986 are not published herein. These Consent decisions are on file and may be inspected upon request to the Hearing Clerk, Office of Administrative Law Judges. However, a list of these decisions is published herein. (53 F.R. 6999, March 4, 1988)

The principal statutes concerned are the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), Animal Quarantine and Related Laws (21 U.S.C. 111 *et seq.*), the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Grain Standards Act (7 U.S.C. 1821 *et seq.*), the Horse Protection Act (15 U.S.C. 1821 *et seq.*), the Packers and Stockyards Act, 1921, (7 U.S.C. 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. 151 et seq.), the Poultry Products Inspection Act (21 U.S.C. 451 et seq.), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151-158).

The decisions published herein are arranged alphabetically by statute and alphabetically within the statute section by respondent, if it is a disciplinary case, or complainant, if it is a reparation case. They may be cited by giving the volume number and page number, for illustration 1 A.D. 472 (1942). It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example D-578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in Agriculture Decisions.

This publication also contains current court decisions of interest involving the regulatory laws administered by the Department.

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In re: ROY CARTER AND RUSSELL M. TRACY, D.V.M. A.Q. Docket No. 271. Decision filed March 3, 1987.

Interstate movement of livestock, without proper documents or testing for brucellosis—Civil penalty.

The Judicial Officer affirmed Judge McGrail's order assessing a civil penalty of $2,500 against respondent for transporting seven bulls interstate that were not accompanied by the proper documents or (as to one bull) not subjected to two official tests for brucellosis prior to movement. Respondent's failure to file a timely answer constitutes an admission of the allegations in the complaint and a waiver of hearing. Respondent's untimely answer would have been to no avail even if timely filed because the answer admits the violations, but contends that they were not willfully or knowingly committed. Willfulness and knowledge of unlawfulness are not elements of the violations. Appropriate service was made when respondent's mother signed the service receipt card, even if she did not forward the complaint to respondent. Due process requires only that the method of service is reasonably calculated to give notice, irrespective of whether actual notice of the complaint is received. Respondent's financial situation has no bearing on the civil penalty to be assessed. Further, an unsubstantiated, alleged inability to pay a civil penalty is not relevant. The civil penalty imposed here is modest considering the importance of the Brucellosis Eradication Program.

Jaru Ruley, for complainant.

Cindy Garner, Crockett, Texas, for respondent.

Initial decision by *Edward H. McGrail, Administrative Law Judge.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER AS TO ROY CARTER

This is an administrative proceeding for the assessment of a civil penalty under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111, 120, and 122), for violations of the Act and the regulations promulgated thereunder (9 C.F.R. §§ 71.18 and 78.1 *et seq.*), governing the interstate movement of cattle without required documents. An initial Default Decision and Order was filed August 18, 1986, by Administrative Law Judge Edward H. McGrail (ALJ) assessing a civil penalty of $2,500.

On November 10, 1986, respondent [1] appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35). [2] The case was referred to the Judicial Officer for decision on February 4, 1987.

Based upon a careful consideration of the record, the initial Default Decision and Order is adopted as the final Decision and Order in this case (with minor trivial changes), except that the effective date of the order is changed in view of respondent's appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

[1] By order of July 16, 1986, the ALJ entered a Consent Decision as to respondent Russell M. Tracy, D.V.M., terminating the proceeding for that respondent.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of cattle because of brucellosis (9 C.F.R. §§ 71.18 and 78.1 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 C.F.R. §§ 70.1 *et seq.* and 7 C.F.R. §§ 1.130 *et seq.*

This proceeding was instituted by a complaint filed on May 30, 1986, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about December 4 and 7, 1984, the respondents transported a total of seven (7) bulls interstate in violation of sections 71.18 and 78.9(d)(3) of the regulations (9 C.F.R. §§ 71.18 and 78.9(d)(3)). The respondent Roy Carter failed to file an answer. This failure to file an answer is deemed an admission of the allegations in the complaint and a waiver of hearing. (See 7 C.F.R. §§ 1.136(c) and 1.139). On this basis, complainant filed a "Motion for Adoption of Proposed Decision and Order As To Roy Carter" on July 26, 1986.

On August 12, 1986, in response to complainant's motion, respondent Roy Carter filed "Objections to Adoption of Proposed Decision and Order" pursuant to section 1.139 of the Rules of Practice. (7 C.F.R. § 1.139). After careful consideration of these objections, it is found that they are not sufficiently meritorious to warrant denial of complainant's motion.

Accordingly, the material facts as to Roy Carter alleged in the complaint are adopted and set forth herein as the findings of fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (See 7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Roy Carter, is an individual whose mailing address is Rt. 3, Box 574, Crockett, Texas 75835.

2. On or about December 4, 1984, the respondent moved interstate six bulls, over two years of age, from Crockett, Texas, to Oklahoma City, Oklahoma, in violation of section 71.18 of the regulations (9 C.F.R. § 71.18) in that the bulls were not accompanied interstate by an owner's or shipper's statement, or other acceptable document, contain-

[*] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

ing, among other things, approved identification of the six bulls, as required.

3. On or about December 4, 1984, the respondent moved interstate six bulls, over two years of age, from Crockett, Texas, to Oklahoma City, Oklahoma, in violation of section 78.9(d)(3) of the regulations (9 C.F.R. § 78.9(d)(3)) in that the six bulls were not accompanied interstate by a certificate containing prescribed information.

4. On or about December 4, 1984, the respondent moved interstate a bull, over two years of age, from Crockett, Texas, to Oklahoma City, Oklahoma, in violation of section 78.9(d)(3) of the regulations (9 C F.R. § 78.9(d)(3)) in that the bull was not subjected to two consecutive official negative tests for brucellosis prior to the interstate movement, as required.

5. On or about December 7, 1984, the respondent moved interstate a bull, over two years of age, from Oklahoma City, Oklahoma, to Crockett, Texas, in violation of section 71.18 of the regulations (9 C.F.R. § 71.18) in that the bull was not accompanied interstate by an owner's or shipper's statement, or other acceptable document, containing prescribed information.

6. On or about December 7, 1984, the respondent moved interstate a bull, over two years of age, from Oklahoma City, Oklahoma, to Crockett, Texas, in violation of section 78.9(d)(3) of the regulations (9 C.F.R. § 78.9(d)(3)) in that the bull was not accompanied interstate by a certificate containing prescribed information.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent, Roy Carter, has violated sections 71.18 and 78.9(d)(3) of the regulations (9 C.F.R. §§ 71.18 and 78.9(d)(3)).

Therefore, the following Order is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Under the Department's rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary, a respondent's failure to file a timely answer or deny the allegations of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. Specifically, the rules of practice provide (7 C.F.R. §§ 1.136(a)-(c), .139, .141(a)):

> § 1.136 *Answer.*
>
> (a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .
>
> (b) *Contents.* The answer shall: (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or
>
> (2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default*. Failure to file an answer within the time provided under < 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

. . . .

§ 1.139 *Procedure upon failure to file an answer or admission of facts.*

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk.

Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

. . . .

§ 1.141 *Procedure for Hearing.*

(a) *Request for Hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

The complaint as to respondent Roy Carter in this case contained allegations virtually identical to the findings of fact, *supra*, and advised respondent that an answer must be filed with the Hearing Clerk, and that failure to file an answer "within the time allowed therefor shall constitute an admission of the allegations in this complaint and a waiver of hearing" (Complaint at 3).

In addition, the letter from the Hearing Clerk serving a copy of the complaint on respondent expressly and accurately advised respondent of the effect of failure to file an answer or plead specifically to any allegation of the complaint. The letter states:

In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20

> days from the receipt of this letter within which to file with the Hearing Clerk, an original and *four* copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny, or explain each of the allegations of the Complaint. Failure to file an answer to or plead specifically to any allegation of the Complaint, shall constitute an admission of such allegation.
>
> Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

Respondent failed to answer the complaint. Only when served with complainant's July 25, 1986, Motion for Adoption of Proposed Decision and Order as to Roy Carter (containing a civil penalty), did respondent Roy Carter file anything with the Department. Even then, neither respondent's untimely answer nor respondent's Objection to Adoption of Proposed Decision and Order, both filed August 12, 1986, denied the allegations of the complaint.

On the contrary, respondent's untimely answer *admitted* the violations specifically listed *for him* in the complaint, but sought absolution because respondent allegedly did not willfully or knowingly violate the regulations. Moreover, respondent had even hired a veterinarian to advise respondent on the proper procedure for interstate movement of cattle under the brucellosis program, and had relied on the professional advice given.

However, even if respondent's answer had been timely filed, it would have been to no avail. Willfulness is not a requirement of the Act (21 U.S.C. § 122) or the regulations, and respondent is responsible for any failure of the veterinarian he selected to meet the requirements of the statute and the regulations.

The ALJ considered respondent's Objections to Adoption of Proposed Decision and Order and found them "not sufficiently meritorious to warrant denial of complainant's motion" (Initial Decision at 1). Particularly lacking in persuasiveness is respondent's attack on the Department's service of process. It is illogical for respondent to assert that proper service was not made in this case. "Jerry Carter," identified by respondent's counsel as respondent's mother (respondent's Objections to Adoption of Proposed Decision and Order at 1 (August 12, 1986)), signed the certified receipt, on or about June 16, 1986, for service of the complaint. On August 1, 1986, "Jerry Carter" also accepted *at the same address* the complainant's Motion for Adoption of Proposed Decision and Order.

The circumstances as to the serving of the complaint are controlled by prior decisions holding that *proper service is made* when respondent is served with a certified mailing at his last known address and someone signs for the document. *In re Cuttone*, 44 Agric. Dec. ____ (Aug. 20,

1985), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Buzun*, 43 Agric. Dec. ____ (June 13, 1984) (default order proper when timely answer not filed; respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for by someone named Buzun).

The rules of practice applicable to the Department's disciplinary proceedings provide (7 C.F.R. § 1.147(b)):

> (b) *Service; proof of service.* Copies of all such documents or papers required or authorized by the rules in this part to be filed with the Hearing Clerk shall be served upon the parties by the Hearing Clerk, or by some other employee of the Department, or by a U.S. Marshal or deputy marshal. Service shall be made either (1) by delivering a copy of the document or paper to the individual to be served or to a member of the partnership to be served, or to the president, secretary, or other executive officer or any director of the corporation or association to be served, or to the attorney of record representing such individual, partnership, corporation, organization, or association; or (2) by leaving a copy of the document or paper at the principal office or place of business or residence of such individual, partnership, corporation, organization, or association, or of the attorney or agent of record and mailing by regular mail another copy to such person at such address; or (3) by registering or certifying and mailing a copy of the document or paper, addressed to such individual, partnership, corporation, organization, or association, or to the attorney or agent of record, at the last known residence or principal office or place of business of such person: Provided, That if the registered or certified document or paper is returned undelivered because the addressee refused or failed to accept delivery, the document or paper shall be served by mailing it by regular mail. Proof of service hereunder shall be made by the certificate of the person who actually made the service: Provided, That if the service be made by mail, as outlined in paragraph (b)(3) of this section, proof of service shall be made by the return post-office receipt, in the case of registered or certified mail, or by the certificate of the person who mailed the matter by regular mail. The certificate and post-office receipt contemplated herein shall be filed with the Hearing Clerk, and made a part of the record of the proceeding.

Accordingly, under the plain provisions of the rules of practice, the default decision was properly issued. Although respondent raises no issue under the Due Process Clause, the Department's rules of practice afford due process. To meet the requirement of due process of law, it is only necessary that notice of a proceeding be sent in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust*

ting aside the default decision here. [4]

The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to

[4] *See In re McDaniel*, 45 Agric. Dec. ____ (Dec. 8, 1986) (default order proper where timely answer not filed); *In re Mayes*, 45 Agric. Dec. ____ (Nov. 24, 1986) (default order proper where answer not filed); *In re Pieszko*, 45 Agric. Dec. ____ (Nov. 12, 1986) (default order proper where answer not filed); *In re Henson*, 45 Agric. Dec. ____ (Nov. 4, 1986) (default order proper where answer admits or does not deny material allegations); *In re Guffy*, 45 Agric. Dec. ____ (Oct. 20, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Blaser*, 45 Agric. Dec. ____ (Sept. 9, 1986) (default order proper where answer does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. ____ (Sept. 9, 1986) (default order proper where timely answer not filed); *In re Schwartz*, 45 Agric. Dec. ____ (Aug. 12, 1986) (default order proper where timely answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. ____ (July 9, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Gutman*, 45 Agric. Dec ____ (June 17, 1986) (default order proper where answer does not deny material allegations); *In re Daul*, 45 Agric. Dec. ____ (Mar. 6, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. ____ (Sept. 23, 1985) (default order proper where timely answer not filed; irrelevant that respondent's main office did not promptly forward complaint to its attorneys); *In re Cuttone*, 44 Agric. Dec. ____ (Aug. 20, 1985) (default order proper where timely answer not filed; respondent Carl D. Cuttone properly served where complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric Dec. ____ (Nov. 1, 1984) (default order proper where timely answer not filed; respondent cannot present evidence that it is unable to pay $54,000 civil penalty where it waived its right to a hearing by not filing a timely answer); *In re Jacobson*, 43 Agric. Dec. ____ (June 26, 1984) (default order proper where timely answer not filed); *In re Buzun*, 43 Agric. Dec. ____ (June 13, 1984) (default order proper where timely answer not filed; respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Mayer*, 43 Agric. Dec. ____ (Apr. 12, 1984) (decision as to respondent Doss) (default order proper where timely answer not filed; irrelevant whether respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec. ____ (Jan. 4, 1984) (default order proper where timely answer not filed); *In re Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely answer not filed); *In re Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where respondents misunderstood the nature of the order that would be issued); *In re Seal*, 39 Agric. Dec. 370, 371 (1980) (default order proper where timely answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

handle its large workload in an expeditious and economical manner. During the last fiscal year, the Department's five ALJ's (who do not have law clerks) disposed of 496 cases. The Department's Judicial Officer disposed of 42 cases. In a recent month, 66 new cases were filed with the Hearing Clerk.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' "[5] If respondent were permitted to contest some of the allegations of fact at this late date, or raise new issues, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. However, there is no basis for permitting respondent to present matters by way of defense at this time.

Respondent's appeal professes an inability to pay the civil penalty and restates points made in his prior filings: that respondent acted in good faith, was not willful, and was ignorant of the regulations; that respondent employed a veterinarian as counsel on the regulations; and that the charge should be dismissed, or, in the alternative, that the civil penalty should be reduced.

As has been painstakingly detailed in the preceding pages, the Department's rules of practice deem it an admission of all material allegations if no answer is filed to the complaint. Therefore, these contentions would have no effect on the decision below. However, even if these contentions are considered in their best possible circumstances, apart from the respondent's failure to file an answer, they would not change the outcome.

Respondent claims to have been ignorant of the regulations. This is inconsistent with respondent's other defense that he hired a veterinarian to help him comply with the regulations. The regulations and their requirements are not difficult to read and understand, and apply equally to all. In any event, this Department never reduces a sanction merely because the violator did not know the procedure required by the Act and regulations. *In re Steinberg Bros., Co.*, 43 Agric. Dec. ____ (Dec. 26, 1984).

Respondent claims to have acted in good faith, and in a way that was not willful. The regulations require neither good faith in compliance nor that violations be willful.

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[5] *Cella* v. *United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), quoting from *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); *accord Swift & Co.* v. *United States*, 308 F.2d 849, 851-52 (7th Cir. 1962).

Respondent claims that his retention of a veterinarian should absolve him of these violations. But, as stated above, he is responsible for the acts (or failures) of his agent.

Respondent's financial situation has no bearing on the civil penalty assessed. The Secretary of Agriculture is authorized to assess a civil penalty of not more than $1,000 per violation of the regulations under the Act (21 U.S.C. < 122). Respondent's failure to answer the complaint deems all material allegations admitted by respondent, and neither the record nor the respondent's appeal shows any reason whatsoever to question the decision below. On the contrary, respondent filed two separate documents *admitting* the violations.

Moreover, it has consistently and routinely been held that an unsubstantiated, alleged inability to pay a civil penalty, which is otherwise statutorily proper for the Secretary to assess, is not relevant. *In re Wall*, 38 Agric. Dec. 1437, 1450-51 (1979), *aff'd in part and rev'd in part*, No. 79-3714 (6th Cir. July 10, 1981) (unpublished order), *printed in* 40 Agric. Dec. 927 (1981); *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974).

The civil penalty assessed here is modest considering the importance of the Brucellosis Eradication Program. As stated in *In re Grady*, 45 Agric. Dec. ____, slip op. at 67 (Jan. 31, 1986):

> The brucellosis eradication program is important to the national welfare. To date, the program has cost in excess of $1 billion. It costs about $150 million a year (Tr. 440).

The Brucellosis Eradication Program is described in *In re Petty*, 43 Agric. Dec. ____, slip op. at 4-5 (Oct. 31, 1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986), as follows:

> 4. Brucellosis (also known as Bangs disease or undulant fever) is a contagious, infectious and communicable disease affecting livestock. It is transmittable to humans. [4] (Tr. 32, 95-96, 1056-59, 1160-64, 1177-80). The incubation period of the disease varies from about 10 days to a year, but does not generally exceed several months (Tr. 95, 1180).
>
> [4] Brucellosis is "a disease of man of sudden or insidious onset and long duration characterized by great weakness, extreme exhaustion on slight effort, night sweats, chilliness, remittent fever, and generalized aches and pains and acquired through direct contact with infected animals or animal products or from the consumption of milk, dairy products, or meat from infected animals" (Webster's Third New International Dictionary, Unabridged (1981), at 285).
>
> For many years the Federal Government has maintained a vigorous and costly program directed to the control and eradication of this disease (Tr. 32-33, 1059-63). For example, in 1980, the Federal Government spent $73,715,667 for brucellosis eradication (1982 Budget Explanatory Notes, USDA, vol.

2, at 8). To control the disease, some entire herds of cattle are destroyed, with some indemnification from the Federal Government (9 C.F.R. < 51.3(a)(2) (1980); Tr. 239-41). Because of the large economic impact of the cattle industry on the nation, the success of the Brucellosis Eradication Program is of national importance.

In carrying out the Brucellosis Eradication Program, the Federal Government, through regulations issued by the United States Department of Agriculture, regulates the interstate movement of cattle. 9 C.F.R. Part 78 (1980).

For the foregoing reasons, the following order should be issued in this proceeding.

Order

Respondent Roy Carter is assessed a civil penalty of $2,500, which shall be payable to the "Treasurer of the United States," by certified check or money order, and shall be forwarded to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within 90 days after service of this order.

In re: DR. JOHN H. COLLINS. V.A. Docket No. 27. Decision and order filed March 4, 1987.

Signing Official Health Certificates before brucellosis test results received from laboratory—Veterinary accreditation suspended.

The Judicial officer reversed Administrative Law Judge Baker's order dismissing the complaint. The Judicial Officer suspended respondent's veterinary accreditation for 60 days for signing Official Health Certificates stating that animals were negative according to the brucellosis test results before respondent had received the results from the State-Federal laboratory. The Judicial Officer revoked respondent's veterinary accreditation for failing to personally draw blood on another occasion, which was sent to the State-Federal laboratory with official brucellosis test records. As to other counts, the Judicial Officer held that there was insufficient evidence to overturn the ALJ's findings that respondent submitted copies of five health certificates, as required, to the State animal health official, and that respondent did not violate the standards by submitting blood samples drawn from nine animals other that the nine listed on a brucellosis test record. When an agency adopts findings of fact by an ALJ, the findings should not be overturned on appeal unless they are hopelessly incredible or flatly contradict a law of nature or undisputed documentary evidence. However, an agency may differ with the conclusions of the ALJ even on a question of the credibility of contradictory witnesses. It is a violation of the Standards for Accredited Veterinarians for a veterinarian to sign a certificate that is incomplete or inaccurate even though he does not permit the certificate to be used. The word "or" is to be given its normal disjunctive meaning. The formalities and technicalities of court pleadings are not applicable in administrative proceedings. Responsible hearsay evidence is admissible in administrative proceedings and may be sufficient to support a finding of fact. The procedural and evidentiary rules in effect in court proceedings are not applicable in the Department's administrative proceedings, and it is the Department's policy to make no effort to follow them.

ROY CARTER AND RUSSELL M. TRACY, D.V.M.

The Brucellosis Eradication Program is of national importance, and respondent's violations were serious. Revocation of a veterinarian's accreditation is not as serious as revocation of a license. Respondent's violations were willful, and therefore there would have been no need to give notice under the APA for a license revocation But the notice provisions of the APA are inapplicable since to federal license is being revoked

Cynthia A. Koch, for complainant.

William Witt, , Oklahoma, for respondent.

Initial decision and order issued by *Dorothea A Baker, Administrative Law Judge.*

Decision and order by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding instituted by the Administrator of the Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture (USDA), under the regulations governing the Accreditation of Veterinarians and Suspension of such Accreditation (9 C.F.R. § 160.1 *et seq.*), hereinafter referred to as the regulations. The Administrator (complainant) seeks to revoke respondent's accreditation as a veterinarian authorized to perform official duties under State-Federal disease eradication programs, because respondent has violated the Standards for Accredited Veterinarians (9 C.F.R. §§ 161.2, 161.3), hereinafter referred to as the standards.

The complaint alleges that respondent has not acted in accordance with the regulations and the standards in that: (i) respondent issued five Official Health Certificates in January 1981, for the intrastate movement of 71 cattle in Oklahoma: (a) listing nine of the cattle as negative without confirmation by the State-Federal laboratory, as required, and (b) failing to submit copies of the five Official Health Certificates to the State Animal Health Official, as required; (ii) respondent submitted nine blood samples to the State-Federal laboratory purportedly from the nine animals listed on the test record dated January 12, 1981, but those animals had been delivered to the buyer on January 9, 1981, making the test record false and inaccurate, in that the blood could not have come from those nine animals; and (iii) respondent submitted in November 1982, a test record of 160 cattle to the State-Federal laboratory which blood samples were not drawn by respondent, as required.

Following a 2-day hearing held in June 1984, on November 13, 1985, Administrative Law Judge Dorothea A. Baker (ALJ) dismissed the proceeding with prejudice.

On January 2, 1986, complainant appealed to, and requested oral hearing of, the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557

has been delegated (7 C.F.R. § 2.35).[1] Respondent filed a reply on January 24, 1986. On January 29, 1986, the case was referred to the Judicial Officer for decision. Complainant filed a motion to clarify the record on February 7, 1986, and respondent filed a reply thereto on February 24, 1986.

Oral argument before the Judicial Officer, which is discretionary (7 C.F.R. < 1.145(d)), is denied inasmuch as the case has been thoroughly briefed, the case is governed by prior precedents and oral argument would seem to serve no useful purpose.

Complainant's motion to clarify the record is also denied inasmuch as the record is already clear on the two points raised in the motion: (a) the Hearing Clerk's December 17, 1986, certified letter to respondent correctly notified respondent that complainant's motion for extension of time to file had been granted and that complainant's petition on appeal was due January 1, 1986 (extended automatically to the next business day, January 2, 1986, by the rules of practice (7 C.F.R. < 1.147(e)), and (b) the complainant's June 21, 1984, letter to respondent's attorney, pursuant to the ALJ's June 13, 1984, directive, specifically lists Mr. Louis B. Miller's signed statement on page 2, item 9, as an anticipated item of proof (Official Transcript at 5).

For the reasons set forth below, suspension for 60 days of respondent's accreditation as a veterinarian authorized to perform official duties under State-Federal disease eradication programs is appropriate for the violation numbered I(a) in the conclusions; and for the violation numbered III in the conclusions the appropriate sanction is revocation of respondent's veterinary accreditation.

Findings of Fact [2]

1. Dr. John H. Collins, respondent, is an individual whose mailing address is 1601 East 6th Street, Stillwater, Oklahoma 74074, and who resides at 3521 South Hudson, Stillwater, Oklahoma (Tr. 329).

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[1] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

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[2] An explanation of the Brucellosis Eradication Program, including relevant provisions of the State statute and Federal regulations and standards is included in the Findings of Fact. Also, conclusions and views are included in some of the findings, since I disagree with the ALJ's findings as to all of the issues, but only reverse as to two. Although numerous citations to the record are included in this decision, the citations are not necessarily complete. Abbreviations used are Tr. for transcript, CX for complainant's exhibit, and RX for respondent's exhibit.

2. Respondent was, at all times material herein, a Doctor of Veterinary Medicine (Tr. 329) and an Accredited Veterinarian in the State of Oklahoma, under the provisions of the applicable regulations (9 C.F.R. Parts 160–162; CX 1).

3. Respondent, pursuant to the Application for Veterinary Accreditation, signed by respondent on March 6, 1967, agreed to conduct brucellosis eradication procedures, and any other State-Federal cooperative work, including preparation and submission of records and reports, in accordance with instructions and rules prescribed by the State Livestock Sanitary Officials (Tr. 64–67; CX 1) and the United States Department of Agriculture (Tr. 16–17; CX 1; Standards for Accredited Veterinarians, 9 C.F.R. < 161.2).

4. Brucellosis (also known as Bangs disease or undulant fever) is a contagious, infectious and communicable disease affecting livestock. It is transmittable to humans.[3] The incubation period of the disease varies from about 10 days to a year, but does not generally exceed several months (Tr. 32). For many years the Federal Government has maintained a vigorous and costly program directed to the control and eradication of this disease (Tr. 12). For example, in 1980, the Federal Government spent $73,715,667 for brucellosis eradication (1982 Budget Explanatory Notes, USDA, vol. 2, at 8). To control the disease, some entire herds of cattle are destroyed, with some indemnification from the Federal Government (9 C.F.R. § 51.3(a)(2) (1980)). Because of the large economic impact of the cattle industry on the Nation, the success of the Brucellosis Eradication Program is of national importance (Tr. 39). Both the Federal Veterinarian in Charge for Oklahoma (Dr. Konyha, Tr. 11) and the Oklahoma State Animal Health Official (Dr. Hartin, Tr. 76) testified that the alleged violations herein were very serious violations of the program.

5. The Standards for Accredited Veterinarians provide (9 C.F.R. § 161.3(b), (d), (g), (h) (emphasis added)):

> (b) An accredited veterinarian *shall not sign* any certificate, form, record or report, *or permit such a certificate*, form, record, or report *to be used* until, and unless, he has ascertained that it has been accurately and fully completed. . . .
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> . . . .
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> (d) An accredited veterinarian shall perform official tests, inspections, treatments, and vaccinations and shall submit specimens to designated laboratories in accordance with Fed-

[3] Brucellosis is "a disease of man of sudden or insidious onset and long duration characterized by great weakness, extreme exhaustion on slight effort, night sweats, chilliness, remittent fever, and generalized aches and pains and acquired through direct contact with infected animals or animal products or from the consumption of milk, dairy products, or meat from infected animals" (Webster's Third New International Dictionary, Unabridged (1981), at 285).

eral and State regulations and instructions issued to the accredited veterinarian by the Veterinarian-in-Charge or the State Animal Health Official, or both.

. . . .

(g) An accredited veterinarian shall take such measures as are necessary to prevent the spread of communicable diseases of livestock or poultry. . . .

(h) An accredited veterinarian shall keep himself currently informed on Federal and State regulations governing the movement of animals and poultry, and on procedures applicable to disease control and eradication programs, including emergency programs. . . . He shall carry out all of his responsibilities under the applicable Federal programs and cooperative programs in accordance with such regulations and instructions issued to him by the Veterinarian in Charge or the State Animal Health Official, or both.

6.The Standards for Accredited Veterinarians provide (9 C.F.R. < 161.3(a) (emphasis added)):

Suspension or revocation of veterinary accreditation. (a) The secretary is authorized *to suspend for a given period of time*, or *to revoke*, the accreditation of a veterinarian when he determines that the accredited veterinarian has not complied with the "Standards for Accredited Veterinarians" as set forth in § 161.2, or in lieu thereof *to issue a written notice of warning* to the accredited veterinarian when the Deputy Administrator determines a notice of warning will be adequate to attain compliance with the Standards.

7. The Oklahoma Agricultural Code (Okla. Stat. Annot. tit. 2, § 6-91, -92, -100, -102, -151 (West 1955)) provides in pertinent part (emphasis added):

§ 6-91. *Formulation of control program*

A program for the control of, and to assist in the eradication of, Bang's disease among livestock of the State of Oklahoma shall be formulated and maintained by the State Board of Agriculture. Such program shall be based upon an approved plan composed of a plan or combination of plans adopted or recommended by the United States Livestock Sanitary Association and approved by the United States Agricultural Research Service and the State Board of Agriculture.

§ *6-92. Official test*

The official test for Bang's disease shall be an agglutination blood test made at the joint State-Federal Laboratory, or other laboratory approved for such test by the State Board of Agriculture. The blood sample for such test shall be drawn by a person approved by the Board. Accredited veterinarians licensed to practice in this state may be granted a certificate by the Board to conduct such tests at their own laboratories. All blood tests will be confirmed by duplicate samples tested at the joint State-Federal Laboratory.

. . . .

§ *6–100. State as eradication area*

The State of Oklahoma is hereby declared a brucellosis eradication area and the Board of Agriculture shall institute a program of eradication in each county as the funds become available as prescribed in the approved plan in order for the State to qualify as a certified free area. . . .

. . . .

§ *6–102. Sale of bovine animals or removal from markets unlawful except under certain conditions*

It shall be unlawful for *any person* or persons, company, firm, corporation, livestock market, concentration yard, or livestock auction, *to sell bovine animals* or to remove bovine animals from markets *unless* such animals are:

(*a*) negative to a blood agglutination test for brucellosis within thirty (30) days of date of sale;

(b) steers or spayed heifers;

(c) cattle consigned direct to slaughter with no diversion in route;

(d) cattle from brucellosis certified free herd;

(e) cattle from qualified herd in certified brucellosis-free area;

(f) female cattle officially brucellosis calf-hood vaccinated under twenty-four (24) months of age;

(g) calves under eight (8) months of age.

. . . .

§ *6–151. Health certificate or permit required for shipment of livestock into State—Diseased livestock*

(a) It shall be unlawful to ship or transport or cause to be shipped or transported in any manner any livestock *into the State of Oklahoma*, unless said livestock are accompanied by an official health certificate or permit or both, which shall be in the possession of the driver of the vehicle or person in charge of the livestock.

8. On January 5, 1981, respondent collected blood specimens from the animals listed on Brucellosis Test Record Numbers 2410935 and 2410936 and submitted those specimens to the State-Federal laboratory for testing. Respondent received the results of these tests, and notification that nine samples had hemolyzed, on January 7, 1981 (CX 2; Tr. 386).

9. Hemolyzed means that there was a breakdown of the red blood cells in the samples (Finding 8), so that the serum could not be separated, which made the samples impossible to test (Tr. 25, 136).

10. On January 8, 1981, respondent *signed* Official Health Certificate Numbers 73-787041, -42, -43, -44 and -45, for the intrastate movement of 71 cattle being sold by Cletus Gouker, Meeker, Oklahoma, to John DeVries, Hugo, Oklahoma, which listed a total of nine animals as negative to the official brucellosis test, without having the test results on the nine animals confirmed by the State-Federal laboratory, as required (CX 3; Finding 7).

11. Respondent, on January 8, 1981, utilized the printed forms of Official Health Certificate Numbers 73-787041 through -45 as a method of accurately listing the cattle purchased for the record keeping of buyer and seller (Proposed Finding Number 5, Respondent's Proposed Findings of Fact, Conclusions, and Order and Brief in Support Thereof, Jan. 30, 1985; Initial Decision, Finding 5, at 5).

12. On January 12, 1981, respondent purportedly rebled nine animals because of the hemolyzed samples (Finding 8), and submitted the blood to the State-Federal laboratory together with Brucellosis Test Record No. 2410934 (CX 4, Tr. 331, 392). Although a great deal of testimony was taken from both sides on this issue, it is not clear to me from the record whether the blood was actually from the nine identified animals, or not. However, the ALJ weighed the credibility of the witnesses and found that Brucellosis Test Record No. 2410934 was accurate, as to the identity of the cattle bled. There is no basis for reversal here.

13. Respondent *used* the Official Health Certificates (Finding 10) to effectuate sale from Cletus Gouker to Mr. John DeVries of the 71 cattle sometime between the 9th of January 1981, and January 14, 1981. Complainant's witness, Mr. DeVries, testified that the transfer, based on the Official Health Certificates, occurred on January 9, 1981 (Tr. 226-27). Respondent's witnesses testified (Mr. Jimmy Gouker, son of Cletus Gouker (Tr. 409, 412) and Dr. Collins (Tr. 332-33)) that it was on January 14, 1981. All witnesses had readily perceived biases or special interests in their testimony, and I would not have decided the facts as the ALJ did. However, there is no basis for reversal here.

14. There is no basis for overturning the ALJ's finding that the respondent submitted copies of all five Official Health Certificates, Numbered 73-787041 through 73-787045, to the State Animal Health Official, as required. (Paradoxically, the ALJ found that respondent was *not required* to submit these certificates in her Finding 7, but was *required* to submit them in her Finding 14 (Initial Decision at 6 and 8, respectively). Although the State Animal Health Official testified that these certificates were not submitted because he had no record of them (Tr. 69), the ALJ found that they had been submitted, and even

speculated on how the Government might have lost them (Initial Decision at 28). While I would not have found the same way on these facts, I will not disturb the ALJ's finding on this point.

15. In November 1982, Mr. Louis Miller agreed to buy 160 head of cattle from Mr. Cletus Gouker. On November 24, 1982, Mark Collins, stepson of respondent, went to Mr. Gouker's premises and, in the presence of Mr. Miller and Mr. Gouker, Mark Collins bled the 160 animals. Respondent arrived at the premises near the end of the bleeding, and stayed for about 15 minutes. Respondent used the blood samples drawn by his stepson to send to the State-Federal laboratory for testing, together with Brucellosis Test Record No. 1548795. The Brucellosis Test Record signed by respondent states:

> I certify that I have drawn blood samples from each animal identified below and have correctly listed each tube number with corresponding identification number.

Respondent shows on the Brucellosis Test Record "DATE BLED 11-24-82." The blood samples drawn by respondent's stepson, Mark Collins, together with the Brucellosis Test Record signed by respondent, were hand delivered to the State-Federal laboratory in Oklahoma City, Oklahoma, by Nathan Goldenberg, an employee of respondent, on or about November 30, 1982.

16. The Cooperative State-Federal Brucellosis Program in Oklahoma requires that prior to sale of test eligible cattle either an Official Health Certificate must be issued (Tr. 58) or a State test must be done (Finding 7). An accredited veterinarian may choose either to use Official Health Certificates or the State method for testing prior to intrastate sale. However, it would be an incorrect finding in this case that the subject cattle could have been sold legally in the State of Oklahoma without one or the other being properly accomplished. In this case, the relevant movement involved a sale. Therefore, all references in this proceeding, whether in the testimony of witnesses, the arguments of counsel or the dicta of the ALJ, are irrelevant to the extent that those references make distinctions about legal movements of cattle within Oklahoma without change of ownership. Also irrelevant is the fact that the accredited veterinarian *could* have chosen the State method, rather than using the Official Health Certificates. Once having chosen the Official Health Certificate method, the accredited veterinarian is bound to follow properly the prescribed procedures.

17. Each alleged violation in the complaint is a serious violation (Tr. 33, 76), any one of which would be the basis for revocation. Both Dr. Konyha, USDA Veterinarian in Charge for Oklahoma, and Dr. Hartin, State Animal Health Official, recommended revocation of Dr. Collins' accreditation subsequent to the informal conference of July 6, 1983, after taking into account Dr. Collins' past history and the current al-

leged violations. (Tr. 35, 37). The record as a whole suggests that respondent has a lax attitude toward the Oklahoma Brucellosis Eradication Program. Lax attitudes and a tendency on the part of some accredited veterinarians and some cattlemen in Oklahoma to circumvent the program are probably a contributing factor in the recent descent of Oklahoma from a certified free State status to a Class B State status (Tr. 344–47).

18. The ALJ's findings that Official Health Certificates are not required as a condition precedent to the movement or change of ownership of the subject cattle (Initial Decision, Finding 6, at 5), and that Oklahoma law does not require a health certificate for the intrastate movement of cattle, but only for cattle coming into Oklahoma (Initial Decision, Finding 19, at 12), are incomplete explications of the law and standards concerning Official Health Certificates (Finding 5) and Oklahoma statutes requiring all test eligible cattle to be tested prior to sale (Finding 7). The plain fact is that the subject cattle could not be sold in Oklahoma without either an Official Health Certificate or a State test. As Dr. Konyha testified "you need either--you need a health paper of some kind. There is a state form that is often used, but for convenience for some reason, apparently, Dr. Collins decided to use a health certificate in lieu of the state form, which would accomplish the same thing. It requires a document" (Tr. 58).

19. In March 1982, USDA Veterinary Medical Officer Dr. Terry Beals performed a brucellosis diagnostic test on the cattle at the JD Ranch, which is owned by Mr. DeVries. (Tr. 143) Dr. Beals determined that there were 67 reactors in the herd of about 320 head, of which 67 reactors, 63 had been purchased from Mr. Cletus Gouker (Tr. 156). Dr. Beals determined that the *probable* source of infection in Mr. DeVries' herd was from those cattle purchased from Mr. Gouker, of Meeker, Oklahoma, referred to in Findings of Fact 10 and 13, *supra*. (Tr. 150, CX 7). Respondent was not charged in the complaint with being the source of this infection (Tr. 180), but this finding is illustrative of the mischief which can occur when the standards are not scrupulously followed.

Conclusions

The complaint in three Roman numerals listed three separate counts, the first of which has two parts, alleging that respondent has not acted in accordance with the regulations (9 C.F.R. < 160.1 *et seq.*) and the standards (9 C.F.R. << 161.2, 161.3) in that:

> I. Respondent issued, on or about January 8, 1981, five official health certificates, Numbers 73–787041 through 45, for the intrastate movement of 71 cattle from Meeker, Okla., to Hugo, Okla.; which certificates were not issued in accordance with Federal and State regulations and instructions issued to the respondent by the Veterinarian-in-Charge or the State Animal Health Official, or both, as required, in that:

(a) Respondent listed nine animals on health certificates, Numbers 73-787041 through 44, as negative to the official brucellosis test without having the test results on the nine animals confirmed by the State-Federal laboratory, as required, and

(b) Respondent failed to submit copies of the five health certificates, Numbers 73-787041 through 45, to the State Animal Health Official, as required.

II. Respondent on or about January 12, 1981, submitted to the State-Federal laboratory brucellosis test record number 2410934, which was not accurately completed, as required, in that the test record contained false information because the blood samples submitted were purportedly taken from the nine animals listed on the brucellosis test record and collected by respondent from the animals on January 12, 1981, and could not have been collected from these animals on that date because the nine animals had been delivered to the buyer on January 9, 1981;

III. Respondent, on or about November 24, 1982, submitted to the State-Federal laboratory brucellosis test record number 1548795, listing 160 cattle owned by Mr. Louis Miller, which test record was not in accordance with Federal-State regulations and instructions issued to respondent by the Veterinarian-in-Charge or the State Animal Health Official, or both, as required, in that the blood samples were not taken from the cattle by respondent.

Each numbered alleged violation will be addressed separately, *infra*, corresponding to the sequence in the complaint. Thus, in this numeration, complaint number II is here number I, III is II, and IV is III.

It is my firm belief based on the record as a whole that respondent committed all four serious violations described above, any one of which by itself would warrant revocation of respondent's accreditation. For reasons set forth below, however, I must conclude that respondent committed only the violation in I(a), to the extent that he *signed* the documents on January 8, 1981, and the violation in III, in that he did not personally draw the blood samples, as required, on or about November 24, 1982, which were then submitted with Brucellosis Test Record Number 1548795.

Although the ALJ found in respondent's favor with respect to each violation, respondent does not deny the essential facts as to violation I(a), and the documentary evidence, together with inferences from the facts, compel me to conclude that respondent committed the first violation by signing the inaccurate forms. As to violation III, the undisputed

facts, which are for the most part corroborated by respondent and respondent's witnesses, and are not discredited by the ALJ, lead to the ineluctable inference that respondent submitted to the lab the blood samples drawn by his stepson, rather than respondent's purportedly redrawn blood samples of 2 days later, as claimed by respondent. Complainant has proven its case regarding violations I(a) and III far beyond the maximum standard that could be required here. [4]

It is the consistent practice of the Judicial Officer to give great weight to the findings of fact by ALJ's since they have the opportunity to see and hear the witnesses testify. [5] When an agency *adopts* findings of fact by an ALJ based on credibility determinations, the task of the reviewing court is easier than when the agency overrules such findings, i.e., an ALJ's findings of fact based on credibility determinations, adopted by the agency, are almost unassailable. *Blackfoot Livestock Comm'n Co.* v. *USDA*, No. 86-7198, slip op. at 6 (9th Cir. Feb. 20, 1987). As stated in Davis, 3 *Administrative Law Treatise* < 17.16, at 336 (2d ed. 1980):

> When the agency adopts the ALJ's findings, the task of the reviewing court is normally easier; a common note that is struck is that an ALJ's findings adopted by the agency may not be upset unless it is "hopelessly incredible or flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony." NLRB v. Dinion Coil Co., 201 F.2d 484, 490 (2d Cir. 1952); International Union v. NLRB, 459 F.2d 1329, 1351 (D.C. Cir. 1972) (Tamm, Jr., concurring and dissenting); NLRB v. Stark, 525 F.2d 422, 425-26 (2d Cir. 1975), cert. denied 424 U.S. 967 (1976); NLRB v. Columbia University, 541 F.2d 922, 928 (2d Cir. 1976).

[4] In license revocation proceedings, complainant must prevail by a preponderance of the evidence (*Steadman* v. *SEC*, 450 U.S. 91, 92-104 (1981); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980)), which would be the maximum possible standard to be applied here. But since respondent has no Federal license to be suspended or revoked (see < III, *infra*), but, rather, is merely being prevented from performing functions under Cooperative State-Federal Disease Eradication Programs, perhaps only a standard of reasonableness must be met. A standard-of-reasonableness test is particularly appropriate since the statute does not provide for subpoena power, which may prevent the agency from being able to fully prove why a veterinarian should not be permitted to be a part of the disease eradication program.

[5] *E.g.*, *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Thornton*, 38 Agric. Dec. 1425, 1426-28 (remand order), *final decision*, 38 Agric. Dec. 1539 (1979) (affirming Judge Baker's dismissal of complaint where she accepted the testimony of respondent's wife, respondent's employee, and respondent's "real good friend" over that of three disinterested USDA veterinarians); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (remand order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979).

However, Professor Davis makes it clear that an agency is in a different position vis-a-vis an ALJ's findings of fact based on credibility determinations than a reviewing court. He states (*id.* at 327):

> Because of the provision of § 557(b) that "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision," the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses, and even despite the hearing officer's observation of the witnesses. The law that had been established before the APA continues: "Even on a question of the credibility of contradictory witnesses, notwithstanding the advantage the examiner has of seeing and hearing them testify, the Board may differ from the conclusion of its examiner." NLRB v. Tex-O-Kan Flour Mills, 122 F.2d 433, 437 (5th Cir. 1941).

Moreover, Professor Davis explains that an agency can overrule an ALJ's findings based on credibility determinations irrespective of whether a very substantial preponderance of the evidence supports the agency's decision. He states (*id.* at 332) that the "orthodox doctrine" consistent with Supreme Court decisions is set forth in *Adolph Coors Co. v. FTC*, 497 F.2d 1178, 1184 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). Quoting from the court's decision rather than the abbreviated version in Professor Davis' treatise (*ibid.*):

> The findings of the Commission must be accepted by this court if there is substantial evidence on the record considered as a whole to support them. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). The Commission's overruling of the Law Judge's findings on the credibility of two witnesses is not required to be supported by a very substantial preponderance of the evidence. Federal Communications Commission v. Allentown Broadcasting Corp., 349 U.S. 358, 75 S.Ct. 855, 99 L.Ed. 1147 (1955). And where there is a possibility of drawing two inconsistent inferences from the evidence, the Commission is not prevented from drawing one. National Labor Relations Board v. Nevada Consolidated Copper Corp., 316 U.S. 105, 62 S.Ct. 960, 86 L.Ed. 1305 (1942); *National Macaroni, supra.* If the inference is supported by substantial evidence, it cannot be set aside even though the court could draw a different inference. *National Macaroni, supra.*
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> The Commission must consider the initial decision of the Law Judge and the evidence in the record on which it was based. Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission, 138 U.S.App.D.C. 152, 425 F.2d 583 (1970). But the findings and conclusions of the Law Judge are not sacrosanct and are not necessarily binding on the Commission or the court; they are part of the record to be considered on appeal. OKC Corp. v. Federal Trade Commission, 455

> F.2d 1159 (10th Cir. 1972). When the Law Judge and the Commission reach opposite results, the Law Judge's findings should be considered on review and given such weight as they merit within reason and the light of judicial experience. But this does not modify the substantial evidence rule in any way. *OKC Corp., supra.*

Accord *Blackfoot Livestock Comm'n Co.* v. *USDA*, No. 86-7198, slip op. at 6 (9th Cir. Feb. 20, 1987).

In a recent case, the Judicial Officer reversed an ALJ's findings based on credibility determinations on the ground that the findings were "hopelessly incredible." *In re Ennes*, 45 Agric. Dec. ____, slip op. at 11-19 (Mar. 3, 1986). However, that decision should not, of course, be construed as a voluntary decision to place a greater burden on the Department than is required, when the Judicial Officer overrules an ALJ's findings based on credibility determinations. In other cases, where the Judicial Officer has overruled an ALJ's findings based on credibility determinations, the Judicial Officer has merely relied on documentary evidence or inferences from the facts. [6]

I. (a) Respondent Violated the Standards (9 C.F.R. § 161.2(b)) by Signing Official Health Certificates on January 8, 1981, Which Were Inaccurate.

Count I(a) alleges that respondent violated the standards by issuing five Official Health Certificates for the intrastate movement of 71 cattle from Meeker, Oklahoma, to Hugo, Oklahoma, which documents were inaccurate in that nine of the cattle listed thereon were certified as negative without confirmation from the State-Federal laboratory, as required (Finding 10).

The ALJ found respondent to be "a most credible witness" (Initial Decision, Finding 11). However, determining the credibility of the

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[6] *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. ____, slip op. at 11-13 (Nov. 15, 1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re Farrow*, 42 Agric. Dec. 1397, 1405-17 (1983), *aff'd in part and rev'd in part on other grounds*, 760 F.2d 211 (8th Cir. 1985); *In re Mattes Livestock Auction Market, Inc.*, 42 Agric. Dec. 81, 96-109, *aff'd*, 721 F.2d 1125 (7th Cir. 1983); *In re Stamper*, 42 Agric. Dec. 20, 28-44 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-08 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished). See, also, *In re Muehlenthaler*, 37 Agric. Dec. 313, 330, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *Federal Radio Comm'n* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285-86 (1933); *Southern Nat'l Mfg. Co.*, v. *EPA*, 470 F.2d 194, 197 (8th Cir. 1972); *Retail, Wholesale & Dep't Store Union* v. *NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972); *Nix* v. *NLRB*, 418 F.2d 1001, 1008 (5th Cir. 1969); *Joy Silk Mills, Inc.* v. *NLRB*, 185 F.2d 732, 742 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951); Davis, *Administrative Law Treatise* § 10.04 (1958 & 1970 Supp.).

witnesses is not important under count I(a) since respondent did not deny that he signed the certificates on January 8, 1981, but rather that he did not "know what day [he] signed the health certificate on" (Tr. 393).

I am here giving respondent the benefit of the doubt regarding his overall testimony on whether he signed the certificates on January 8, 1981, because he had previously testified that he had signed on that date. In fact, complainant's counsel had specifically asked respondent what day he had drawn the blood, what day the lab tested the blood, and what day respondent had signed the certificates. Respondent affirmatively testified that he signed on the 8th of January 1981. (Tr. 385–86):

Q. Dr. Collins, can you tell me why did you put 1–8–81 on the health certificate?

A. I don't know, for some reason, probably I was at Cletus' place and I saw the cattle then -- for what reason I don't know.

Q. But, did you see the animals when you bled them on the 5th?

A. Yes.

Q. Now, sir, why is it, for the date of test, you have 1–5–81?

A. That's the day you must have there, the day you saw the cattle.

Q. The day you saw the cattle?

A. No, the day you drew the, got the blood out of the cow.

Q. Okay. Then, sir, why below that did you put, State/Federal Laboratory?

A. Because the State/Federal Laboratory ran the test on the blood.

Q. But, they didn't run it on the 5th, did they?

A. No, they did not.

Q. Because you drew the blood on the 5th. They ran it on the 7th.

So, we have the 5th that you drew the blood. We have the 7th that the lab tested the blood. We have the 8th that you signed this.

A. That's true.

Respondent's testimony throughout the proceeding displays a lax attitude toward the Cooperative State-Federal Disease Control and Eradication Program in Oklahoma, and consistently seeks to minimize the seriousness of the State-Federal Program (Finding 4). For instance, when complainant's counsel confronted Dr. Collins on the question of how he could have signed the certificates on January 8, 1981, as negative for nine animals, without confirmation by the State-Federal laboratory, respondent as much as admitted that he listed as negative on the 8th of January blood which he drew on January 12, 1981, that he just expected to be negative on its later return (on January 14, 1981) from the lab (Tr. 392-93):

Q. Didn't you know that the blood samples from the 5th had hemolyzed and couldn't be run?

A. Yes, I did.

Q. So, for those animals, nine, isn't 1-12-81 the correct day you drew the blood?

A. It could be. It's the correct day I drew the blood but were they -- and they were negative. And, so if they were negative on the 12th, they are going to be negative on the 5th.

Q. But, sir, I thought you just told me they could -- that this particular area --

A. If I still have both legs on the 12th, then I still have, then I can bet you $20. I had both legs on the 5th.

Q. Sir, all I'm trying to ascertain is this is -- you said this was the date you drew the blood?

A. This is the date I drew the blood.

Q. Yes, but for those nine animals the blood sample was hemolyzed. You drew it again on the 12th. So, why didn't the health certificate reflect that?

A. And, I might draw it again on the 22nd.

Q. Uh-hum.

A. But, these animals were still negative on the 5th.

Q. But, sir, how do you know those nine were negative on the 5th when you didn't have any blood to run?

A. Because they are negative on the 12th. And, if they're negative on the 12th, they'll be negative on the 5th.

Q. So, you didn't see any need to go back and change your --

A. No, sir, I did not.

I infer from all the facts, particularly the fact that respondent admittedly dated the health certificates January 8, 1981, that respondent actually *signed* the documents on January 8, 1981, before the results of the January 12, 1981, retest were received on January 14, 1981. Dr. Collins' cavalier attitude and reverse methodology from the patent requirements of the standards are particularly disturbing.

The Standards for Accredited Veterinarians (9 C.F.R. § 161.2(b)) provide, in pertinent part, that an accredited veterinarian shall not *sign* any certificate *or* permit such a certificate to be *used* unless it is accurate and fully completed (Finding 5). There is much argument in this proceeding on both sides, including findings and dicta by the ALJ, on the matter of when the certificates were "issued." (Tr. 26-30, 39-44, 49-54, 58, 70-72, 86-87, 104, 109, 228, 332, 376, 385-95, 397; ALJ's Decision and Order, pages 6, 7, 8, 22, 29, Nov. 13, 1985).

While the term "issued" is used in the complaint, it is more useful as a shorthand description of the standard's bifurcated overall scheme, than as a definitive term. The standard on its face is clearly and plainly written in the disjunctive, differentiating between *signing*, on the one hand, *or*, on the other, *using*. "In statutory construction 'or' is to be given its normal disjunctive meaning unless such a construction renders the provision in question repugnant to other provisions of the statute." *In re Beef Nebraska, Inc.*, 44 Agric. Dec. ____, slip op. at 34 (Nov. 26, 1985), *aff'd*, 807 F.2d 712 (8th Cir. 1986), quoting from *Gay Union Corp.* v. *Wallace*, 112 F.2d 192, 197 n.15 (D.C. Cir.), *cert. denied*, 310 U.S. 647 (1940). *Accord United States* v. *Field*, 255 U.S. 257, 262 (1921). Thus, it is possible under 9 C.F.R. § 161.2(b) for a certificate to be *signed* but not *used*; or, conversely, to be *used* but not *signed*. Both, whether done jointly or severally, could result in violations.

Compare, for instance, Dr. Collins' *use* of Official Health Certificates as a tally sheet (Finding 11) for the convenience of buyer and seller. However, it is not necessary to address that in this proceeding, where respondent has both signed (Finding 10) *and* used (Finding 13) the subject documents, but has not been charged in the complaint for improper use without signing.

Even though the complaint charges that respondent "issued" inaccurate health certificates, the complaint is broad enough to cover the lesser included offense (which I have found) of signing inaccurate health certificates.

Moreover, it is well settled that the formalities and technicalities of court pleading are not applicable in administrative proceedings. [7] It is

[7] *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 253 (1944); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 142-44 (1940).

only necessary that the complaint in an administrative proceeding reasonably apprise the litigant of the issues in controversy; any such notice is adequate and satisfies due process in the absence of a showing that some party was misled. [8]

The documentary evidence (Official Health Certificate Numbers 73-787041 through -45, dated January 8, 1981, and signed by respondent), testimony (Tr. 385-86, 392-93) and inferences from the facts establish a violation of the standards (9 C.F.R. § 161.2(b)). These Official Health Certificates had inaccurately listed as negative nine animals whose blood had hemolyzed, rendering impossible such a negative determination on January 8, 1981.

(b) There Is No Basis to Overturn the ALJ's Finding that Respondent Submitted Copies of the Five Health Certificate Numbers 73-787041 Through -45, as Required.

Count I(b) alleges that respondent violated the standards by failing to submit five Official Health Certificates, numbers 73-787041 through -45, dated January 8, 1981, to the State Animal Health Official, as required (Finding 14).

The State Animal Health Official, Dr. Hartin, testified that his office had no record of ever receiving these numbered documents required to be filed by respondent (Tr. 69, 90). Business records kept in the normal course of business are usually probative to their content, without some other direct evidence to the contrary. Respondent had a very good reason to withhold submission of the documents, and that would be to conceal a violation on January 8, 1981. However, respondent's testimony that the five Official Health Certificates were submitted as required (Tr. 384) was not discredited. There is no other proof extant, and the ALJ found that Dr. Hartin's testimony "is not deemed reliable or persuasive on this point" (Initial Decision, Finding 19, at 12).

[8] *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350-51 (1938); *Aloha Airlines, Inc.* v. *CAB*, 598 F.2d 250, 261-62 (D.C. Cir. 1979); *NLRB* v. *Sunnyland Packing Co.*, 557 F.2d 1157, 1161 (5th Cir. 1977); *L.G. Balfour Co.* v. *FTC*, 442 F.2d 1, 19 (7th Cir. 1971); *Bruhn's Freezer Meats of Chicago, Inc.* v. *USDA*, 438 F.2d 1332, 1342 (8th Cir. 1971); *Swift & Co.* v. *United States*, 393 F.2d 247, 252-53 (7th Cir. 1968); *Cella* v. *United States*, 208 F.2d 783, 788-89 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954); *American Newspaper Pub. Ass'n* v. *NLRB*, 193 F.2d 782, 799-800 (7th Cir. 1951), *cert. denied sub nom. International Typographical Union* v. *NLRB*, 344 U.S. 816 (1952); *Mansfield Journal Co.* v. *FCC*, 180 F.2d 28, 36 (D.C. Cir. 1950); *E.B. Muller & Co.* v. *FTC*, 142 F.2d 511, 518-19 (6th Cir. 1944); *A.E. Staley Mfg. Co.* v. *FTC*, 135 F.2d 453, 454-55 (7th Cir. 1943); *NLRB* v. *Pacific Gas & Elec. Co.*, 118 F.2d 780, 788 (9th Cir. 1941); *In re Sterling Colo. Beef Co.*, 35 Agric. Dec. 1599, 1601 (1976) (ruling on certified questions), *final decision*, 39 Agric. Dec. 184 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re Holcomb*, 35 Agric. Dec. 1165, 1173-74 (1976).

I would not have deemed respondent's anecdote concerning the subsequent brucellosis testing of a supposedly butchered cow in the Indemnification Program (Tr. 43, 46-47, 124-25, 160-61; RX A, RX B) to be proof that the Federal Government is a poor recordkeeper (Initial Decision, Finding 19, at 12). Moreover, I would not have speculated on the reason for the absence of the Official Health Certificates from Dr. Hartin's files as the ALJ did in her Decision and Order (Initial Decision at 28).

Suffice it to say that the ALJ personally took the testimony on this count, and there is no proper ground for reversal here.

II. There Is No Basis to Overturn the ALJ's Finding that Respondent Properly Submitted Brucellosis Test Record Number 2410934 on January 12, 1981, as Required.

Count II alleges that respondent violated the standards by submitting Brucellosis Test Record Number 2410934, on or about January 12, 1981, which was not accurately completed, in that the blood submitted with Brucellosis Test Record Number 2410934 was not drawn from the nine animals listed thereon, as required (Finding 12).

Complainant's theory of this count is that respondent signed certificates on January 8, 1981, which cleared all 71 cattle for subsequent sale on January 9, 1981, before the pertinent results by the State-Federal laboratory were available on nine cattle whose blood samples had hemolyzed. Thus, it is by logical deduction that complainant seeks to prove count II, to wit: that the nine blood samples submitted on January 12, 1981, could not have come from the nine cattle listed on Brucellosis Test Record Number 2410934 because those animals had already been delivered to the buyer on January 9, 1981. My reading of the record suggests that complainant has no other technical difficulty with Brucellosis Test Record Number 2410934 than that the blood submitted was not from the listed cattle.

Respondent testified that the cattle were delivered on January 14, 1981 (Tr. 384). Complainant's witness, Mr. DeVries, testified that he took delivery on January 9, 1981 (Tr. 226). Respondent's witness, Mr. Jimmy Gouker, testified that the cattle were delivered on the 14th of January 1981 (Tr. 412). Both Mr. DeVries (Tr. 227) and Mr. Gouker (Tr. 410) testified from cancelled bank checks to refresh their respective recollections. The ALJ found complainant's witness, Mr. DeVries, not persuasive or reliable, in that Mr. DeVries gave "less than forthright, assured testimony" (Initial Decision at 26). But, in essentially the same factual situation (using cancelled checks to refresh recollection) the ALJ chose to believe respondent's witness, Mr. Jimmy Gouker, whom she found a "persuasive witness" (Initial Decision, Finding 11). All the witnesses had readily apparent biases, Mr. DeVries, Dr. Collins and Mr. Jimmy Gouker (possibly) had the pend-

ing civil suit (Tr. 6, 311, 336-39, 347, 387-88), and Dr. Collins had this proceeding, to affect their testimony.

I would not have found for respondent on the testimony of these witnesses. However, as pointed out at the outset, I will not reverse the ALJ's findings based on her evaluation of the credibility of witnesses except in rare circumstances, which are not present here.

III. Respondent Did Not Personally Draw Blood from the 160 Cattle Listed on State-Federal Brucellosis Test Record Number 1548795, as Required.

The Cooperative State-Federal Brucellosis Eradication Program, which is based on Federal (Finding 5) and State (Finding 7) standards and regulations, requires that an accredited veterinarian personally draw the blood samples for submission--together with the Official Brucellosis Test Record--to the State-Federal laboratory. Count III alleges that respondent did not personally draw the blood submitted with Official Brucellosis Test Record Number 1548795, as required (Finding 15).

Count number III turns upon the relative credibility of witnesses, and whether their respective scenarios are believable in the factual situations described. Although somewhat pedestrian, the best way to discern with reasonable certainty what likely happened on the crucial dates of November 22 and 24, 1982, is to review the testimony in some detail. When the relevant statements of respondent, Louis Miller, Mark Collins, and Nathan Goldenberg are juxtaposed, they reveal undisputed facts which result in a strong inference that respondent did not personally draw the blood reported on Brucellosis Test Record Number 1548795, as required.

Respondent had been working for Mr. Cletus Gouker (who was deceased by the time of the hearing (Tr. 408)) for "in excess of ten years" (Tr. 366). Respondent testified that he sent his stepson Mark Collins to Gouker's premises on November 22, 1982 (Tr. 333), when Gouker "persisted" in his request for respondent to send a layman over because "the buyer [Mr. Louis Miller] would be there that day and he wanted to look at the cattle as they went through the chute" (Tr. 334).

Respondent testified that he arrived on November 22nd for a short while at the end of the day and met Mr. Louis Miller, but that he did not draw any blood in front of Mr. Louis Miller. Respondent testified that after his stepson's work on November 22, 1982, he later returned on the 24th [9] to draw blood from the same animals (Tr. 358). Denying that he refrigerated and kept the blood from the 22nd, respondent testified rather that he "threw it in the trash," and personally drew 160 new samples on the 24th (Tr. 359). This activity would have required a 100-mile, 2-hour round trip to and from the Gouker premises, and a maximum of 4 hours of blood work (Tr. 359-60), for a total of 6 additional hours. Respondent testified that he did not even charge Gouker

for his stepson's work on the 22nd (Tr. 361). Complainant's counsel elicited most of the above testimony from respondent during cross-examination, and the further fact that major portions of the Brucellosis Test Record Number 1548795 were filled in by *someone other than respondent* (Tr. 357-63) (emphasis added):

Q. Okay. On what day did Mark go out to the premise to draw blood?

A. He did not go out -- I did not send him at any time to draw blood from Cletus Gouker's cattle.

Q. Okay, what did you send him to do?

A. I sent Mark to Cletus Gouker's place to get things ready and have them ready for when I got there because I was a very busy man that day.

Q. Okay.

And, he did not draw any blood?

A. He drew 160 samples of blood.

Q. But, sir, you just stated you didn't have him to draw blood?

A. No, you stated that.

Q. No, I asked you --

A. I stated that --

Q. I asked you if you sent him out to draw blood on the 22nd?

A. I did not send him out to draw blood on the 22nd.

Q. Okay. But, he drew blood on the 22nd?

A. He went to prepare for me and subsequently drew blood.

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[9] Respondent's exhibit E for identification, which is a letter from the Department to respondent dated June 15, 1983, stating, *inter alia*, that the blood was drawn on November 29, 1982, was not received in evidence, and therefore, there is no basis for any argument that might be made by respondent to the effect that Louis Miller must have originally told the Department that the blood was drawn on No-vember 29, 1982. In any event, the basis for the Department's error is obvious. f the Brucellosis Test Record signed by respondent shows a figure 9, 1982 (CX 5, p. 1), but on the other pages of the vritten as November 24, 1982. I infer that the errone-'s letter came from the respondent's poor handwriting ort. Respondent testified that the date on the first page 24, 1982 (Tr. 355).

Q. On what day did he draw the blood?

A. 22nd.

Q. On -- so, on 11-22-1982, your son, Mark, did draw blood, 160 samples?

A. He did.

Q. Okay.

Now, was that 160 samples of blood, from the animals on this test chart?

A. Yes, it was.

Q. Okay.

Now, you also testified that you then went back on 11-24, yourself, and you personally drew the blood from these animals?

A. That's true.

Q. Okay. And, that on 11-22, when you went out it was almost dusk and you were only there for a short period and you met Mr. Miller?

A. Yeah -- I saw Mr. Miller, I'm sure I talked to him.

Q. You're sure?

A. I don't know if there was a formal introduction or not but I'm certain -- that we were then as close as you and I.

Q. Okay.

Dr. Collins, if your son drew blood on the 22nd, why did you go back on the 24th to draw blood from the same animals?

A. State law requires it.

Q. The State law requires it, okay.

Dr. Collins, what did you do with the blood that your son drew on the 22nd?

A. Threw it in the trash.

Q. You threw all the vials in the trash?

A. Uh-hum.

Q. Dr. Collins, do you have a refrigerator?

A. Yes, I do.

Q. If you had to put that blood in the refrigerator, would it have kept?

A. Yes, it would have.

Q. Thank you, sir.

But, you didn't do that?

A. No, I did not.

Q. How long did it take you on the 24th, to draw the blood from the 160 animals?

A. I don't remember because we were range breeding that day.

Q. Can you render a guess how long it would take you to draw 160 samples?

A. I would say it would probably take all 160 samples -- that would be probably two and a half to three hours, maybe four.

Q. Maybe four hours at max?

And, how far of a drive was that?

A. It's 50 miles to Cletus' place.

Q. So, 100 miles round trip?

A. Right.

Q. Okay. And, sir, how long would it take you to drive 100 miles?

A. I don't know, probably two hours.

Q. Probably two hours?

A. Right.

Q. And, when you went there on the 24th, did you go directly and start drawing the blood or did you talk to Mr. Gouker first and have things get ready or --

A. No, I was in no rush on the 24th.

Q. You were in no rush. So, if we add the maximum time it would take to draw the blood, plus travel time, and you stated you could not go on the 22nd because you were a very busy man.

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A. Didn't do what in front of Mr. Gouker.

Q. Dispose of the blood that your son drew?

A. No.

Q. Okay.

And, then you went back two days later, and you drew blood from the same animals, you spent the driving time going there. Did you charge for your time for your son on the 22nd?

A. No, I did not.

Q. You did not. Well, sir, tell me, again, why did you send your son on the 22nd?

A. To get things ready because we knew we were going to be in a rush. We were probably going to have to bleed by light, artificial light. And, this is car lights.

Q. Uh-hum. I knew I was going to run late, the sales is, was going to last late.

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A. And, if we had to do that, I wanted everything ready. He was there with the tubes and I sent tubes and everything he's going to need, so when I stepped in we can start.

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A. Yeah.

Q. So, you sent your son out on the 22nd, to get things ready. He drew blood from the same animals, but you threw that blood in the trash. Now, I assume you didn't do that in front of Mr. Gouker?

A. Didn't do what in front of Mr. Gouker.

Q. Dispose of the blood that your son drew?

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Q. Uh-hum. I knew I was going to run late, the sales is, was going to last late.

Q. Uh-hum.

A. And, if we had to do that, I wanted everything ready. He was there with the tubes and I sent tubes and everything he's going to need, so when I stepped in we can start.

Q. Okay.

Did your son tell you why he drew the blood?

A. Yes.

Q. What did he tell you?

A. That Mr. Miller and Mr. Gouker persisted at him to draw the blood, they persisted at him and he did.

Q. And, he did. Sir, did you do a lot of work for Mr. Gouker?

A. Yes, I do -- or did.

Q. You did. But, you stand firm that you sent your son out on the 22nd, he drew the blood from the same animals. But yet, you went back on the 24th and you threw those samples from the 22nd away.

A. Yes, I did.

Q. And, you did all of that because you knew that it was wrong for your son to draw the blood without you being there?

A. Yes.

Q. Dr. Collins, I'd like to call your attention to Complainant's Exhibit No. 5. Is that your signature on the first page?

A. It is.

Q. Okay. Could you turn to the second page, please? Okay, that is a printing of Dr. Collins, correct?

A. Yes, sir.

Q. Okay, is that your printing?

A. That is my printing there, yes.

Q. Okay. Could you turn to the next page, please? Again, is that your printing?

A. No, it isn't, this page was printed by --

Q. Okay, could you turn to the next page, please? And, what page number is that?

A. This might be mine, I don't know.

Q. That's four, page four of seven.

A. This one is mine, maybe this is mine, let me check, I don't know. *This one is not mine.*

Q. That one is not yours.

A. And, this one is mine.

Q. The next one is yours. I'm asking you to look at just the word "Collins".

A. I'm looking at it.

Q. Okay, the next one?

A. *This is not mine.*

Q. That's not yours. And, the next one?

A. There's one more.

Q. Two more.

A. *This is not mine.*

Based on all the evidence as to this issue, I believe that respondent has constructed an elaborate scenario to rebut Mr. Louis Miller's sworn statement, reproduced below, that Mr. Miller saw respondent at the Gouker premises on *November 24, 1982*, after Mr. Miller watched his stepson actually bleed the 160 cattle on *November 24, 1982*. Although the ALJ specifically found respondent to be "a most credible witness" (Initial Decision, Finding 11), and respondent's testimony on this count to be "both credible and most persuasive" (Initial Decision,

Finding 17), based on all the facts, I do not believe respondent when he testified that these events occurred on November 22, 1982. However, even if I did believe respondent about the November 22nd date, it would not change the outcome, because I would still infer that respondent did not go out and rebleed the 160 cattle. That is, respondent used the blood which was drawn by his stepson on *either* November 22, 1982, *or*, November 24, 1982.

Mr. Louis Miller appears by way of a sworn statement, because he was unable to appear personally (Tr. 292). Since the Department does not have subpoena power in these types of cases, and cannot pay witnesses' expenses, there was no way for the Government to compel Mr. Louis Miller's appearance (Tr. 292). When complainant sought to introduce the Miller statement, respondent's counsel replied that "we have no objections to that" (Tr. 291).

Thus, Mr. Louis Miller's sworn statement was properly admitted, and is such crucial testimony that it is reproduced here, in its entirety, from the record (CX 10). Please note that: (1) Mr. Miller's signature appears at the bottom of each of his typed, numbered pages, which signatures are typed and are set off by brackets here; (2) there are strike-throughs where Mr. Miller edited his statement, with his added material now set off by brackets; (3) Mr. Miller's changes were all initialed by him in the original and are here set off by brackets; (4) Mr. Miller's "Additional Comments" appearing at the end of his sworn statement were handwritten by USDA investigator Harry L. Pearce, in Mr. Miller's presence (as were all his editorial changes), were read and approved by Mr. Miller and appear here set off by brackets; and (5) USDA Investigator Harry L. Pearce testified that Mr. Miller edited the statement in Mr. Pearce's presence, line for line, and corrected all incorrect information (Tr. 295-99, 324-25):

> I, Louis Miller, of Route 1, Byars, Oklahoma, of my own free will do hereby make the following sworn statement in regard to the cattle which I purchased from Mr. Cletus Gouker of Meeker, Oklahoma.
>
> I presently reside in McClain County, seven (7) miles south of Asher, Oklahoma, on Highway #177. My previous residence was in the Brewster, Kansas area where I operated a farming and stocker-feeder operation. Upon moving to Oklahoma, I contacted Mr. Gouker in mid-November concerning the purchase of some cattle to stock my new place in McClain County. I drove to Meeker, Oklahoma, in mid-November and was shown three (3) groups of cattle by Mr. Gouker in three (3) separate pastures. One pasture contained approximately thirty (30) head of cattle and was located approximately one (1) mile south of the Lincoln-Pottawatomie Countyline in Section 7, Township 11 North, Range 4 East. The second pasture, containing approximately sixty (60) head of cattle, was located

approximately three (3) miles south of Meeker, Oklahoma, in Pottawatomie County, Section 4, Township 11 North, Range 4 East. The third group of cattle which I observed contained approximately seventy (70) head of cattle and was located approximately one (1) mile south of Meeker, in Lincoln County, Section 28, Township 12 North, Range 4 East.

[Louis B Miller]

These three (3) pastures comprise a total of one-hundred sixty (160) head of cattle which I examined and agreed to purchase. It was agreed that a veterinarian would come to Mr. Gouker's premise to test these cattle and that I would be present when the cattle were bled so that I might examine the cattle as to ages and place bangle tags in the ears of the cattle which I would purchase.

Each of these three (3) groups contained black and black-white faced cattle, and some of the cattle in each group already had calves by their sides. There were approximately thirty (30) head of calves at the time I originally viewed the cattle.

On November 24th, I traveled to Meeker, Oklahoma, to assist Mr. Gouker in the testing of the one-hundred sixty (160) head of cattle which I had agreed to purchase. All of the cattle were grouped together at Mr. Gouker's premises ready for the testing. A young man identified as the veterinarian's son was there to bleed the cattle. The first group of cattle which were bled were primarily those cows which had calves by their sides. There were a few dry cows in the first group, but most of the first thirty to forty (30-40) animals were cows with calves. Each of the animals bled received a new bright metal eartag applied by the individual bleeding the cattle, and Mr. Gouker put in my

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[Louis B Miller]

bangle tags at the same time. The first seventy-five (75) animals were tagged consecutively with orange bangle tags numbered one through seventy-five (1-75). The next seventy-five (75) animals bled were tagged with white bangle tags numbered consecutively one through seventy-five (1-75). The final ten (10) animals were tagged with ten (10) small yellow bangle tags numbered ninety-one through one-hundred (91-100).

Near the end of the bleeding of the cattle, another gentleman arrived identified as the veterinarian. ~~and assisted as the final animals were bled and picked up the blood to take it to be sent in for testing~~. [LBM*]. I had not met or seen the veterinarian until the last few cattle were to be bled.

On November ~~30~~ [29 - LBM], 1982, Mr. Gouker called me to state that the cattle were all clean and that they could be

delivered. On ~~this same date~~ [November 30, 1982 - LBM], I traveled to Meeker, Oklahoma, with my stock trailer to assist in hauling the cattle and calves. Two (2) semi-loads of cows and a large number of calves in my trailer were delivered to my premises in McClain County. On returning to Meeker to get the balance of the cattle, Mr. Gouker met us on the road and stated that there was one (1) suspect in the group of animals tested and that all of the animals would have to be returned to his premises.

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[Louis B Miller]

Upon learning this, we returned to my premises and re-loaded the animals to send back to Mr. Gouker's premises.

I told Mr. Gouker at this time that if there was any problem with the test on the cattle that I did not want any part of the cattle. He informed me at this time that the animal was just a suspect and that everything could be worked out.

On ~~December 10~~ [the night of December 9, - LBM], 1982, Mr. Gouker called to inform me that the suspect had been removed and that the state had given him the go-ahead to sell the balance of the cattle. On ~~this same date~~ [Dec. 10, 1982 - LBM], I received one-hundred fifty-nine (159) head of cattle from Mr. Gouker. At this time, I was led to believe that only one (1) animal from the one-hundred sixty (160) which I had observed being tested was removed from the herd and the balance of the one-hundred sixty (160) head were sent on to my premises.

Additional Comments:

[* The individual who Cletus Gouker identified as being Dr. John Collins stayed at the farm for approximately fifteen (15) minutes. We did not draw any blood while he was there. The young man that tested the cattle took the blood. The young man was nineteen (19) to twenty-one years old. He was 5'5" to 5'6", 140-145 lbs.]

A. We had to get all of our stuff unloaded and set up, rig up a table to set our tubes on.

Q. Uh-hum.

A. You know, get everything set up, it doesn't take that long.

Q. Okay. Now, when you got everything, the table, everything set up, what type of items were on the table?

A. The paperwork and the box of tubes and my hand tagging --

Q. By paperwork you mean the test charts?

A. The field sheet.

In spite of the minimal set-up time, respondent sent his stepson on to the test site hours before his arrival. Mark Collins testified that he bled cattle destined for Mr. Louis Miller on November 22, 1982, at the Gouker premises for the blood samples to accompany (what later became) Brucellosis Test Record Number 1548795 (Tr. 420). Mr. Mark Collins' further testimony was that respondent was "upset" about it, and that respondent told the witness that the blood drawn would have to be "thrown out and pulled again" (Tr. 422). However, Mark Collins testified on direct examination that he neither witnessed respondent drawing the blood samples from the same cattle nor did he see the existing samples, drawn by him, thrown away by respondent or anyone else (Tr. 421-22):

Q. Alright. When you went from Tulsa to Meeker [i.e., Mr. Gouker's premises] did your dad go with you?

A. No, sir.

Q. What did he tell you to do?

A.He told me to go down and get things ready and he would be there as soon as he could get there.

Q. Okay. Did you go down and get things ready?

A. Yes.

Q. Okay. Did he later show up?

A. Yeah, a couple hours, not much later.

Q. Okay. Between the time you got things set up and the time he got there, did you bleed any cattle?

A. Yes, sir.

Q. How come?

A. Well, we waited around and Cletus asked me if I would go ahead and start and he though, you know, Dr. Collins would be there, so we started. Just, we just ended up working on those -- until he got there.

Q. Okay. Do you know what happened to that blood?

A. Supposedly, it had to be thrown out.

Q. Okay.

A. I didn't ever see that again.

Q. Did you kind of get chewed out for going ahead and starting?

A. He was upset about it. He told me it had to be thrown out and he pulled again.

Q. Do you know, of personal knowledge, whether it was pulled again? By personal knowledge --

A. I wasn't there.

Q.Okay, you don't have personal knowledge then, that's what I meant.

Respondent's employee, Mr. Goldenberg, testified that he assisted respondent in rebleeding the same 160 cattle on the *24th of November 1982* (Tr. 442). Respondent likewise testified that he rebled these 160 animals on that day (Tr. 335).

Complainant's witness, Mr. Louis Miller (by sworn statement), indicated that he was present at the Gouker premises on *November 24, 1982*, at which time he saw an individual fitting Mr. Mark Collins' description bleeding the 160 head (Tr. 289). Moreover, Mr. Miller stated he saw respondent at that time, but he did not see respondent draw any blood (Tr. 298). Respondent's testimony corroborates the fact that respondent did not draw any blood in the presence of Mr. Miller, but avers that the date was November 22, 1982 (Tr. 335).

In summary, then, we have the following undisputed facts:

1. Respondent had been doing veterinarian work for Mr. Gouker for in excess of 10 years (Tr. 366);

2. Mr. Louis Miller, who purchased the 160 head of cattle involved here from Mr. Gouker, was insistent that the blood be drawn on the day that he was there at the Gouker premises so that he could carefully observe each animal while the blood was being drawn (Miller Statement);

3. Mr. Gouker expressed a strong desire to Dr. Collins that he (Dr. Collins) draw the blood while Mr. Miller was present (Tr. 334);

4. As a result of Mr. Gouker's strong urgings, respondent sent his stepson, Mark, to the Gouker premises alone, and respondent planned to come later (Tr. 334, 421);

5. The amount of "advance" work that the stepson could lawfully do was trivial, consisting merely of setting up a table and putting bottles, paperwork and tags on the table (which would take just a few minutes) (Tr. 423);

6. At the request of Mr. Gouker, respondent's stepson, Mark, began drawing blood from the animals in the presence of Louis B. Miller and drew the blood from almost the entire 160-head lot before respondent arrived at the Gouker premises (Tr. 334-35, 420-22);

7. Respondent stayed at the Gouker premises for about 15 minutes (Miller Statement), and did not personally draw any blood (Miller Statement; Tr. 334-35);

8. Respondent's employee, Nathan Goldenberg, hand-carried the 160 vials of blood to the State-Federal laboratory the following Tuesday after Thanksgiving 1982, or November 30th (Tr. 439);

9. In order for respondent to go back to the Gouker premises and redraw the blood samples from the 160 head of cattle, respondent would have had to drive 100 miles round trip and spend 3-4 hours drawing the blood (Tr. 360).

Based on these undisputed facts, I infer that respondent used the blood samples taken by his stepson, refrigerated them, and later sent them to the laboratory for testing, rather than redrawing the blood 2 days later, as claimed by respondent.

My inference is also supported by respondent's general attitude with respect to the Brucellosis Eradication Program. Perhaps this attitude is best explained by his understanding of his active role in effectuating cattle sales for his clients. Complainant's counsel asked Dr. Collins if he was acting as an agent of the State or Federal Government when providing services in the eradication program, and respondent's answers indicated some confusion, but more of a belief that he was working for his clients who paid him for his services (Tr. 381): Q.What I'm asking is, when you submitted these Brucellosis test reports or when you do other functions in connection with the Brucellosis Eradication Program, testing, tagging, etcetera, do you feel that you are working for the State or Federal government?

A. No.

Q. Okay, who are you working for, sir?

A. I'm working for my client.

Q. You're working for your client?

Dr. Collins, do you disagree with the statement that as an accredited veterinarian you are an extension of the Federal government?

A. Yes, I agree with that part.

Q. You agree with that part. But, yet, you're not working for them when you do these activities in the Eradication Program?

A. They are certainly not paying me for it.

Also in this same portion of the testimony complainant's counsel asked respondent why respondent went to such great lengths to react to his client's requests. Respondent answered that he does everything that he can to respond to his client's requests, and to assist in the sale of cattle (Tr. 383):

Q. So, the majority of your income is from?

A. Private sources.

Q. Private sources.

Dr. Collins, there is something I'd like for you to expound upon for me. Why did you feel it so necessary that you react to Mr. Gouker's request for the test of those cattle when you were so busy?

A. You aren't very familiar with veterinarians.

Q. Okay.

A. Most veterinarians do react to a client and they crowd everything they can into a day.

Q. Uh-hum.

A. He wanted to sell his cattle. He was a good client. He's a good man, his man was going to be there. I wanted to do everything I could, and as we well know, I couldn't.

Q. You wanted to do everything you can to assist him in that sale of cattle?

A. That's part of the service that I offer.

Certainly, there is nothing wrong with a professional providing good service to a client. However, an accredited veterinarian must not lose sight of the public interest, which he is bound to serve under his accreditation. The public interest in the State of Oklahoma under the eradication program is to reduce and then totally remove brucellosis (Finding 7). Respondent had subscribed to this program (CX 1; Tr. 380; Finding 3).

However, throughout this proceeding, respondent expressed dissatisfaction with the cooperative program, and testified that he had consulted "people [he knows] in politics" to try to change the program (Tr. 380). Respondent testified that he participated in disagreements (on how to complete cooperative program forms) among the Federal and State officials (Dr. Konyha and Dr. Hartin, respectively, and re

spondent (Tr. 390)). At one point, respondent testified that if the standards were followed as interpreted by certain health officials, then "the animal industry would shut down and stop tomorrow, you would have Oklahoma City so full of cows you couldn't come to town" (Tr. 397).

Although the cooperative program's requirements are somewhat time-consuming, respondent's analysis, which complains that the program interferes with smooth commerce in Oklahoma cattle, is not well taken. On the contrary, I believe that the record in this proceeding reveals that the State of Oklahoma is probably suffering more restraint on commerce in cattle due to the lax attitudes of some cattlemen and some accredited veterinarians than because of the program. In fact, one only has to look at the eroding status of brucellosis infection in Oklahoma to understand the real problem.

For instance, Dr. Hartin testified that until about 1980 or 1981 Oklahoma was certified as free of signs of brucellosis, but that by the time of this hearing, Oklahoma was a Class B brucellosis State (Tr. 63). The brucellosis classification of a state is very important to cattle commerce because of the commensurate degree of testing required for change of ownership. Dr. Hartin went on to testify that violations like the ones alleged in this proceeding could further erode the status of the State. If Oklahoma's status were lowered from a B to a C, there would be a tremendous negative impact on the cattle industry because in a Class B State the requirement to move cattle interstate or intrastate is a single negative test within 30 days prior to shipment. However, in interstate shipments from a Class C State, the requirement is two negative tests at least 60 days apart, with the second test within 30 days of shipment (Tr. 73):

> Q. Okay.
>
> Dr. Hartin, what effect would violations like this, what potential effect could violations of that nature have with regard to your achieving eradication of brucellosis or achieving a higher free status in the state of Oklahoma?
>
> A. The effect would be that you could possibly infect another herd which would spread within that herd. The status of the state is dependent upon the amount of infection in the state. And if you continue to increase the amount of infection then the status of the state could be lowered from a B to a C which would have a tremendous impact on the industry of the state in the movement of livestock in interstate commerce.
>
> Q. Could you elaborate a little bit on the impact to the industry, in what way?
>
> A. From a class B state the requirement to move cattle interstate is a single negative test within 30 days prior to shipment. The same that is required to move within the state.

> However, to move from a class C state the requirement is two negative tests at least 60 days apart, with the second test within 30 days of shipment. This puts a tremendous burden on the cattle industry to get these cattle tested twice in order to meet interstate shipping requirements.

From the foregoing, it is easy to see that the real danger to the movement of cattle in commerce in the State of Oklahoma is the failure to control the spread of brucellosis.

As stated above, I have found that respondent's stepson, Mark, drew the blood from the 160 animals on November 24, 1982, based on Louis Miller's sworn statement and my inference from the undisputed facts. This constitutes a serious violation of the standards, and strikes at the very heart of the Brucellosis Eradication Program (Finding 17). In fact, the Federal and State officials would lose control over the program, rendering it ineffective, if the program could not require that the accredited veterinarian personally draw the blood-test samples.

The ALJ, however, believed the testimony that these events occurred on November 22, 1982, and that respondent and Mr. Goldenberg, his longtime former employee, then recently rehired, went back on November 24, 1982, and rebled the 160 animals. In my view, the inference from the undisputed facts set forth above (along with respondent's general attitude towards the Brucellosis Eradication Program) outweighs the self-serving testimony of respondent and his longtime employee, notwithstanding the ALJ's credibility determinations. However, in the event a reviewing court should disagree, I will set forth the sanction for each violation separately in the order.

Since I have overturned the ALJ's finding that respondent personally drew the blood samples on November 24, 1982, respondent's argument that he was denied due process because he had no opportunity to cross-examine Louis Miller, whose sworn statement was received in evidence, or Mark Newman, who was involved in the original interview of Mr. Miller with respect to the affidavit, is not moot. However, it is well settled that responsible hearsay evidence is admissible in administrative proceedings and may be sufficient to support an administrative finding of fact. *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 791-92 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976). In *Maine Potato Growers*, it is stated (34 Agric. Dec. at 791-92):

> The copies of the Federal inspection certificates were taken from official Government files and constituted reliable hearsay, which is admissible in administrative proceedings. *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126, 155; *National Labor Rel. Bd.* v. *Imparato Stevedoring Corp.*, 250 F.2d 297, 302-303 (C.A. 3); *Phelps Dodge Refining Corp.* v. *Federal Trade Com'n.*, 139 F.2d 393, 397 (C.A. 2); *Ellers* v. *Railroad Retirement Board*, 132 F.2d 636, 639 (C.A. 2); *International Ass'n, Etc.* v. *National Labor R. Board*, 110 F.2d 29, 35 (C.A.D.C.), affirmed, 311 U.S. 72; *National Labor Relations*

> *Board* v. *Remington Rand, Inc.*, 94 F.2d 862, 873 (C.A. 2), certiorari denied, 304 U.S. 576.
>
> . . . .
>
> In some circumstances it has been held that hearsay evidence by itself is sufficient to support administrative findings of fact (compare *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F.2d 862, 873 (C.A. 2), certiorari denied, 304 U.S. 576; *Ellers* v. *Railroad Retirement Board*, 132 F.2d 636, 639 (C.A. 2); Davis, *Administrative Law Treatise* (1958), < 14.11; 40 Cornell L. Q. (1954), pp. 141–148; with *Edison Co.* v. *Labor Board*, 305 U.S. 197, 230; and *Willapoint Oysters* v. *Ewing*, 174 F.2d 676, 690–691 (C.A. 9)). But in this case we have adequate corroborating evidence.

In the present case, there is ample evidence to corroborate the information in the affidavit. Specifically, respondent and his stepson admit that the facts referred to in the sworn statement as to the blood samples being drawn by a young man (Mark Collins) in the presence of Louis Miller are true, and the only dispute is whether Mark Collins drew the blood on November 22 or November 24, 1982. As stated above, I find respondent's explanation, that Mark Collins drew the blood on November 22 and that this was thrown away, to be incredible.

Although the ALJ observed on page 20 of the Decision and Order of November 13, 1985, that she did "not deem it necessary to decide" the due process argument in this case, she did state by way of dicta that the "evidence adduced at the hearing . . . should partake and be in accord with that which is well recognized and accepted by the Federal courts" (*ibid.*). Presumably, she means that the evidence should be of the type that the Federal courts recognize as admissible *in an administrative proceeding*, even though it would not have been admissible in a court proceeding. It has repeatedly been held that the procedural and evidentiary rules in effect in court proceedings are not applicable in the department's administrative disciplinary proceedings, [10] and it is the

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[10] *Fairbank* v. *Hardin*, 429 F.2d 264, 267 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970) (summaries of records admissible); *Swift & Co.* v. *United States*, 317 F.2d 53, 55 (7th Cir. 1963); *Swift & Co.* v. *United States*, 308 F.2d 849, 851–52 (7th Cir 1962); *Cella* v. *United States*, 208 F 2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954); and *see American Beef Packers, Inc.* v. *USDA*, 486 F.2d 1048, 1049 (8th Cir. 1973); *In re Wall*, 38 Agric Dec. 1437, 1446 n.4 (1979) (official department publications admissible), *rev'd in part on other grounds*, No. 79-3714 (6th Cir. July 10, 1981) (unpublished decision, not to be cited as precedent), *printed in* 40 Agric. Dec. 927 (1981)

department's policy to make no effort to follow them.[11]

In the final analysis, respondent's behavior has resulted in serious violations of the Standards for Accredited Veterinarians (Finding 17). This behavior should not be confused with a lack of understanding of program requirements. On the contrary, respondent knows the requirements only too well, having once served as a Federal Government employee in Mississippi (Tr. 368).

The Brucellosis Eradication Program is of national importance. In 1980, the Federal Government spent $73,715,667 for brucellosis eradication (Finding 4). In *In re Winger*, 38 Agric. Dec. 182, 189 (1979), involving a hearing held in 1978 leading to the revocation of a veterinarian's accreditation for stating on test records that he drew blood from 19 horses and 13 bulls, when, in fact, he drew blood from only three horses and three bulls (because of the untame disposition of the other animals), it is stated:

> Brucellosis has cost our Nation hundreds of millions of dollars a year in recent years, and is still costing about $30 million a year (Tr. 16). The eradication program depends on the integrity of the work done by accredited veterinarians such as respondent.

Respondent, by signing Brucellosis Test Record Number 1548795 relating to the unrestricted intrastate movement of 160 cattle, without personally drawing the blood samples, as required, seriously violated the Standards for Accredited Veterinarians.

As stated in *In re Scott*, 37 Agric. Dec. 1822, 1832 (1978), *aff'd*, No. CV 78-0208-D (C.D. Ill. May 23, 1979), *aff'd per curiam*, No. 79-1709 (7th Cir. Feb. 12, 1980) (unpublished), *printed in* 39 Agric. Dec. 104 (1980):

> The backbone of the nation's animal disease eradication and control program is the official health certificate. It must provide assurance to both the regulatory officials and the new owner of livestock that newly acquired animals will not introduce disease into the livestock population. It provides control of brucellosis, tuberculosis, and other communicable diseases that can affect both animals and man. Millions of dollars of public funds spent to eradicate livestock disease can be offset very quickly by practices indulged in by respondent.

The practices involved in *Scott*, just quoted, which led to the revocation of his accreditation as a veterinarian, involved his deliberate sign

[11] *In re Corona Livestock Auction, Inc.*, 36 Agric. Dec. 1285, 1309-12 (1977), *rev'd on other grounds*, 607 F.2d 811 (9th Cir. 1979); *In re DeJong Packing Co.*, 36 Agric. Dec. 1181, 1222-24 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980); *In re Hines*, 35 Agric. Dec. 113, 125 n.11 (1976); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 791 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 513 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished).

ing and leaving with cattle owners incomplete Official Health Certificates, which could later be used by the cattle owners to ship their cattle in unrestricted interstate commerce. While complainant's evidence herein did not purport to reach quite this level of abuse, it takes very little imagination to foresee the great mischief which could occur if accredited veterinarians permitted others than themselves to draw the blood samples to be submitted to the State-Federal laboratory. Documents could get into commerce which certify infected animals as free of disease, allowing spread of the disease to animal and man, great economic loss, and great harm to the State-Federal Brucellosis Eradication Program.

Complainant adduced much evidence to show that respondent had engaged in conduct encompassing the same kind of behavior found in both the *Winger* and *Scott* proceedings. Complainant, however, did not satisfy the trier of fact that it carried its burden of proof on any count. Nevertheless, based on these precedents, a severe sanction should be imposed because of my finding that respondent did not personally draw the blood samples as discussed above.

The regulations as to accredited veterinarians provide, in pertinent part (Finding 6; 9 C.F.R. § 161.3(a)) (emphasis added):

> (a) The Secretary is authorized *to suspend for a given period of time*, or *to revoke*, the accreditation of a veterinarian when he determines that the accredited veterinarian has not complied with the "Standards for Accredited Veterinarians" as set forth in § 161.2, or in lieu thereof to issue a written notice of warning. . . .

Respondent's serious violation of the Standards for Accredited Veterinarians warrants revocation of his accreditation to perform disease control and eradication functions under cooperative State-Federal programs. However, such revocation is not as severe as a "license" revocation. As stated in *In re Winger*, 38 Agric. Dec. 182, 187 (1979), *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979), differentiating between the severity of "license" revocation and "accreditation" revocation:

> It is important to note that this is not a license revocation proceeding. License revocation would be a more severe action because it would effectively deprive respondent of his livelihood. On the other hand, accreditation revocation would merely limit respondent from engaging in one aspect of his veterinary practice, e.g., federal-state control and disease eradication programs.

Respondent's violation was willful, as that term is used in the Administrative Procedure Act (5 U.S.C. § 558(c)). *In re Shatkin*, 34 Agric. Dec. 296, 297-314 (1975). An "action is willful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless dis-

regard of statutory requirements." *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981).

Accordingly, there would have been no need to give respondent notice of his violation and an opportunity to demonstrate or achieve compliance, even if the notice provisions of the Administrative Procedure Act (5 U.S.C. § 558(c)) were applicable.

But the notice provisions are inapplicable since respondent has no Federal license that is being revoked. As stated in *In re Ruster*, 41 Agric. Dec. 845, 852 (1982):

> Accreditation of Veterinarians is not a license to which an applicant is entitled as a matter of law. It is solely a ministerial privilege conferred on certain veterinarians to cooperate in the management of the Brucellosis Program. This privilege is conferred at the discretion of the Deputy Administrator as set out in 9 C.F.R. Part 161. It is not necessary, however, to engage in a lengthy dissertation of the distinctions between a license and accreditation under the Program to answer Respondent's argument because, even if accreditation were a license, the exception provided in the statute would apply. The actions of Respondent in issuing the Certificates were clearly willful acts and willful violations of the Regulations. Moreover, the acts of Respondent were detrimental to the public interest. [12]

The *Ruster* principles were recently affirmed in a similar case in *In re Petty*, 43 Agric. Dec. ____ (Oct. 31, 1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986).

For the foregoing reason, the following order should be issued. [13]

Order

The veterinary accreditation of Dr. John H. Collins, under the provisions of 9 C.F.R. << 160-162, is hereby: (1) suspended for 60 days, for the violation in count I(a), and (2) revoked, for the violation in count III.

This order shall be effective 30 days after service on respondent.

In re: ADOLPH R. HOOPER AND B.G. SMITH. A.Q. Docket No. 282. Decision and order filed February 10, 1987.

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[12] The notice provisions of the Administrative Procedure Act are not applicable "in cases of willfulness, or those in which public health, interest, or safety requires otherwise" (5 U.S.C. § 558(c)). Here the public health, interest and safety "requires otherwise."

[13] This is one of a group of cases that has been unreasonably delayed in the Office of the Judicial Officer. During 1985 and 1986, the workload of the Judicial Officer doubled. Because of budgetary constraints, an assistant was not obtained until November 2, 1986.

ADOLPH R. HOOPER and B.G. SMITH

Interstate transportation of brucellosis exposed cattle not accompanied by required permits—Admission of material allegations—Civil penalty.

Clement McGovern, for complainant

Respondent, pro se

Decision issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER AS TO RESPONDENT B. G. SMITH

Preliminary Statement

This proceeding was instituted under the Act of February 2, 1903, as amended, (21 U.S.C. § 111 and 120) (Act) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated section 111 and 120 of the Act (21 U.S.C. § 111 and 120) and section 78.8 of the regulations promulgated thereunder (9 C.F.R. § 78.8).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent on July 30, 1986.

Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) applicable to this proceeding, the respondent was informed in the complaint and by the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint. The respondent has filed an answer in which he admits the material allegations of fact contained in the Complaint. Under such circumstances, section 1.139 of the Rules state that such action constitutes a waiver of hearing and directs the complainant to file for a Decision based on the admission. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to deny the in his answer, are adopted and set forth herein as the findings of fact.

Findings of Fact

1. B.G. Smith is an individual whose address is Route 1, Centre, Alabama 35960.

2. On or about October 2, 1985, the respondent moved interstate four (4) brucellosis exposed cattle from Centre, Alabama, to Rome, Georgia, in violation of section 78.8 of the regulations (9 C.F.R. § 78.8), because the brucellosis exposed cattle were not accompanied by a VS Form 1-27 permit or an "S" brand permit, as required.

Conclusion

By reason of the facts in the findings of fact set forth above, the respondent violated the Act and regulations promulgated thereunder. Therefore, the following order is issued.

Order

The respondent is hereby assessed a civil penalty of one thousand dollars ($1,000.00). The civil penalty shall be made payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to the United States Department of Agriculture, Animal and Plant Health Inspection Service, Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota 55403.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This decision and order became final March 24, 1987.—Editor.]

In re: RONNIE SHELBY. A.Q. Docket No. 308. Order filed March 25, 1987.

Order issued by John A. Campbell, Administrative Law Judge.

ORDER GRANTING MOTION TO DISMISS

For good cause shown, Complainant's motion to dismiss the Complaint in this proceeding, is granted.

In re: TERRY SMITH. A.Q. Docket No. 262. Decision and order filed February 10, 1987.

Transporting interstate, livestock which tested brucellosis reactor—Civil penalty.

Respondent transported a heifer which had been tested and found to be a brucellosis reactor, across state lines for supplemental tests. Befor submitting the animal for the testing, respondent removed identifying eartags and fasely identified someone other than himself as its owner. After the new test, which also showed the animal to be a brucellosis reactor, respondent transported it back across state lines. Respondent thereby willfully violated various USDA regulations (9 CFR §§ 71.18(a)(1)(i), 78.7 (a) and (b)). The transportation of the heifer was not exempt from the regulator requirements as a movement of cattle "during the course of normal ranching operations" under 9 CRF § 78.18. Nor did the "extension" of time given respondent to obtain additional testing allow him to transport the animal interstate for such testing. Assessed a civil penalty of $900.

Clement McGovern, for complainant.

Respondent, pro se.

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER

ADOLPH R. HOOPER and B.G. SMITH

Interstate transportation of brucellosis exposed cattle not accompanied by required permits—Admission of material allegations—Civil penalty.

Clement McGovern, for complainant

Respondent, pro se

Decision issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER AS TO RESPONDENT B. G. SMITH

Preliminary Statement

This proceeding was instituted under the Act of February 2, 1903, as amended, (21 U.S.C. § 111 and 120) (Act) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated section 111 and 120 of the Act (21 U.S.C. § 111 and 120) and section 78.8 of the regulations promulgated thereunder (9 C.F.R. § 78.8).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent on July 30, 1986.

Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) applicable to this proceeding, the respondent was informed in the complaint and by the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint. The respondent has filed an answer in which he admits the material allegations of fact contained in the Complaint. Under such circumstances, section 1.139 of the Rules state that such action constitutes a waiver of hearing and directs the complainant to file for a Decision based on the admission. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to deny the in his answer, are adopted and set forth herein as the findings of fact.

Findings of Fact

1. B.G. Smith is an individual whose address is Route 1, Centre, Alabama 35960.

2. On or about October 2, 1985, the respondent moved interstate four (4) brucellosis exposed cattle from Centre, Alabama, to Rome, Georgia, in violation of section 78.8 of the regulations (9 C.F.R. § 78.8), because the brucellosis exposed cattle were not accompanied by a VS Form 1-27 permit or an "S" brand permit, as required.

Conclusion

By reason of the facts in the findings of fact set forth above, the respondent violated the Act and regulations promulgated thereunder. Therefore, the following order is issued.

Order

The respondent is hereby assessed a civil penalty of one thousand dollars ($1,000.00). The civil penalty shall be made payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to the United States Department of Agriculture, Animal and Plant Health Inspection Service, Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota 55403.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

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Transporting interstate, livestock which tested brucellosis reactor—Civil penalty.

Respondent transported a heifer which had been tested and found to be a brucellosis reactor, across state lines for supplemental tests. Befor submitting the animal for the testing, respondent removed identifying eartags and fasely identified someone other than himself as its owner. After the new test, which also showed the animal to be a brucellosis reactor, respondent transported it back across state lines. Respondent thereby willfully violated various USDA regulations (9 CFR §§ 71.18(a)(1)(i), 78.7 (a) and (b)). The transportation of the heifer was not exempt from the regulator requirements as a movement of cattle "during the course of normal ranching operations" under 9 CRF § 78.18. Nor did the "extension" of time given respondent to obtain additional testing allow him to transport the animal interstate for such testing. Assessed a civil penalty of $900.

Clement McGovern, for complainant.

Respondent, pro se.

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER

Fifty head of cattle were tested March 6, 1985 forbrucellosis, an infectious disease harmful to both cattle andpeople. Five head were classified as "brucellosis reactors."They were tagged and branded as reactors. Thirty-nine otherswere branded as "brucellosis suspects" and sold for slaughter.

The remainding six heifers, which tested negative, had beenvaccinated as calves. They were not branded, but were held therein quarantine for further testing. Terry Smith, who had helpedin the testing, purchased these six heifers which then remained in the quarantined pasture while further testing took place.

On April 5, 1985 the six were again tested and classified as"negative."

One died and the remaining five were again tested July 6,1985 with four again being classified as negative. The fifth (the subject of this complaint) was initially classified as abrucellosis *reactor*, but this classification was changed tobrucellosis *suspect* six days later, on re-evaluation of the history and test results.

On August 5, 1985 this heifer was again retested and again classified as a brucellosis *suspect.*

The August 29, 1985 test then showed her as a brucellosis *reactor.* Terry Smith requested time to have additional testingdone. An extension was granted to October 6, 1985.

On September 16, 1985, Terry Smith transported this heifer – classified officially as a brucellosis reactor under the USDAregulations – from the quarantined pasture at Hendrix, Oklahoma to Bonham, Texas, a distance of about 25 miles or so, for the purpose of having a Texas veterinary do the supplemental tests.

Before submitting the animal to the veterinary in Texas forthe testing, respondent Terry Smith removed the identifyingOklahoma eartags. Smith then falsely identified the heifer asbeing owned by someone other than himself.

The September 16 Texas tests also show the animal to be a brucellosis reactor.

Respondent Smith than returned the heifer from Bonham, Texas to the quarantined pasture in Oklahoma.

Complainant charges respondent Terry Smith with violations of the Act of February 2, 1903 (21 USC § 111 & 120) and related regulations (9 CFR 71.1 concerning the interstate transportation of animals in general and § 78.1 concerning the handling and interstate movement of brucellosis reactor cattle in particular).

In particular, complainant alleges that respondent violated regulatory restrictions when he moved this heifer interstate without required individual identification tags (9 CFR 71.18(a)(1)(i)), without a "B" brand on the left jaw (9 CFR 78.7(a)), without a metal reactor tag on the left

ear (9 CFR 78.7(a)), without a required permit for brucellosis reactor cattle (9 CFR 78.7(b)), to an unauthorized destination (i.e., not a "specifically approved stockyard" nor a "recognized slaughtering establishment") (9 CFR 78.7).

Complainant sees four violations of the § 78 provisions that day when respondent drove south to Bonham, then four more when he drove back home after visiting the veterinary facilities. Two violations of 71 are alleged (but one was dismissed by complainant).

The transportation of this heifer from Hendrix, Oklahoma to Bonham, Texas for the purpose of having veterinary medical tests performed, and the return trip, constitute interstate movement well within the scope and purpose of this Act and regulations. This is clearly not movement of cattle "during the course of normal ranching operations," which would exempt some cattle moved under 78.18 regulatory requirements, as argued by respondent. (9 CFR 78.18)

To exempt cattle moved interstate for the purpose of veterinary medical treatment or tests would open an intolerable loophole in the regulatory scheme designed to inhibit the spread and transfer of diseases among cattle, and people.

Further, this argument presented by respondent Smith in his brief is not within the scope of the pleadings, nor is it supported by any evidence concerning "normal ranching operations."

Further, respondent Smith also argues that the "extension" of time given to him to obtain addition testing implied that he could transport the animal interstate to accomplish this purpose. This argument, first raised in respondent Smith's brief, is also beyond the scope of the pleadings and improperly raised. Respondent did not offer any evidence of any other oral "extensions" of time exempting the cattle from all normal regulatory restrictions or limitations. Such an exemption seems absurd on it's face.

Regulatory restrictions applicable to a brucellosis suspect or reactor would/should not be suspended just because someone doubts the test results.

To the contrary, such an interpretation would be totally inconsistent with any tight management requirements necessary to carryout the purpose of the law and related regulations to prevent the spread of infectious disease among cattle, and potentially, to people.

Respondent contends that he tried to comply with the law, that he never willfully or intentionally violated the law and that, to the contrary, his rights were violated by complainant.

The evidence is clear and convincing that respondent Smith knew this heifer was classified as a brucellosis reactor before he transported it from a quarantined pasture in Oklahoma to see a veterinary medical doctor in Texas. Smith desired a "second opinion" because of some uncertainty in making the diagnosis.

In the four tests between March 6 and August 5, the first two were negative, the third on July 6 was initially classified as a brucellosis *reactor*, but was changed to *suspect* six days later when the test results were reconsidered and re-evaluated. Another test August 5 was inconclusive concerning the *reactor* status, but was a stronger indication of *suspect* status. The August 29th test clearly placed the heifer in the *reactor* class.

Respondent Smith was skeptical concerning these findings and desired confirmation. He was given to October 6 to have additional tests done. The record fails to show any grounds for his skepticism.

The record establishes very careful consideration of the status of this heifer by the USDA officials throughout this period and through all of these tests from March through August 1985. Respondent Smith, and his heifer, received every consideration that could be extended to him.

Respondent Smith admittedly removed identification tags from the animal to insure unbiased test opportunities by people (in Texas) unfamiliar with its history and test results in Oklahoma.

It seems more likely than not, to achieve this secrecy, he removed the tags before reaching the state border, not leaving them to be removed as he neared the Texas vet's facilities. The best place and opportunity to remove the tags probably was in the quarantined pasture (in Oklahoma) while loading her in the truck. A secure time and place to do this near the Texas vet's facilities would not be assured.

The evidence establishes that it is more likely than not that the identification tags were removed before crossing the Texas, Oklahoma border.

The preponderance of the evidence is persuasive and convincing that respondent smith moved the animal in violation of the regulations as alleged in the complaint.

Respondent knew exactly what he was doing and intended to do what he did. He just did not know the consequences of his actions, nor did he intend those consequences. His failure to understand that what he was doing was in violation of the regulations is irrelevant. His actions were "willful" as used in administrative law proceedings. *Butz v Glover Livestock*, 411 US 182, 185 (1973); *Goodman v Benson*, 286 F2d 896, 900 (CA7 1961); *Townsend v. U.S.*, 95 F2d 352, 357–8 (CADC 1938) *cert. denied*, 303 US 664 (1938); *Silverman v CFTC*, 549 F2d 28, 31 (CA7 1977); *Amer. Fruit Purveyors v U.S.*, 630 F2d 370, 374 (CA5 1980); *Henry S. Shatkin*, 34 Agric. Dec. 296 (1975); *G. Steinberg & Sons*,32 Agric. Dec. 236, 263–269 (1973) aff'd 491, F2d 988 (CA2 1974) *cert. denied*, 419 US 830 95 Supreme Court 53, 42 L.Ed2d 55 (1974); *Finer Foods Sales Co. v John R. Block*, Secretary of Agriculture, USA, 708 F2d 774 (CA, DC 5/27/83); *Vrana*, AWA 244 J.O. decision, 11/6/84 p. 20.

ear (9 CFR 78.7(a)), without a required permit for brucellosis reactor cattle (9 CFR 78.7(b)), to an unauthorized destination (i.e., not a "specifically approved stockyard" nor a "recognized slaughtering establishment") (9 CFR 78.7).

Complainant sees four violations of the § 78 provisions that day when respondent drove south to Bonham, then four more when he drove back home after visiting the veterinary facilities. Two violations of 71 are alleged (but one was dismissed by complainant).

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The evidence establishes that it is more likely than not that the identification tags were removed before crossing the Texas, Oklahoma border.

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Complainant recommends a civil penalty of $900 ($100 for each violation). Binding precedents require that "great weight" be given to the recommendations of the complainant requirements. *In re Braxton Worsley*, 33 Agric. Dec. 1547, 1567 (1974). *In re Sy B. Gaiber and Co.*, 31 Agric. Dec. 843, 845-51 (1972); *In re J.A. Speight*, 33 Agric. Dec. 280, 310-19 (1974); *In re Samuel Esposito*, 38 Agric. Dec. 613, 665 (1979).

The multiplicity of violations alleged for the trip to Bonham, Texas may be questionable, but it is consistent with USDA practice. The evidence supports complainant's allegations. The recommended civil penalty will be assessed.

Complainant's Motion that the allegations of paragraph 3 (concerning the alleged failure to have identifying eartags on the return trip to Hendrix, Oklahoma) be dismissed is granted.

Order

The allegations contained in paragraph 3 are dismissed with prejudice.

The respondent, Terry Smith is assessed a civil penalty of $900. [1] Payment shall be made within 180 days from the effective day of this Order.

This Order shall become final and effective thirty-five (35) days after service on respondent, unless there is an appeal to the USDA Judical Officer within thirty (30) days of service. (7 CFR 1.142(c) & 1.145(a))

[This decision and order became final March 31, 1987.—Editor.]

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[1] This civil penalty shall be paid by certified check or money order, payable to the "Treasurer of the United States."

It shall be mailed to the U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, MN 55403.

The docket number of this case (AQ 262) shall be shown on the face of the certified check or money order.

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Respondent Smith was skeptical concerning these findings and desired confirmation. He was given to October 6 to have additional tests done. The record fails to show any grounds for his skepticism.

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The evidence establishes that it is more likely than not that the identification tags were removed before crossing the Texas, Oklahoma border.

The preponderance of the evidence is persausive and convincing that respondent smith moved the animal in violation of the regulations as alleged in the complaint.

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Order

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This Order shall become final and effective thirty-five (35) days after service on respondent, unless there is an appeal to the USDA Judical Officer within thirty (30) days of service. (7 CFR 1.142(c) & 1.145(a))

[This decision and order became final March 31, 1987.—Editor.]

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[1] This civil penalty shall be paid by certified check or money order, payable to the "Treasurer of the United States."

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The docket number of this case (AQ 262) shall be shown on the face of the certified check or money order.

PACKERS AND STOCKYARDS ACT

DISCIPLINARY DECISIONS

In re: OSCAR BLACK, III, AND CUSTOM CATTLE COMPANY, INC. P&S Docket No. 6666. Decision and Order filed January 21, 1987.

Dealer—Failure to pay when due—Suspension of registration—Cease and desist order.

Summary: Respondents found to have failed to pay promptly and in full for 1,072 cattle purchased for a total of $246,443.77. Respondents paid all but one seller within two or three weeks after the due date. The remaining seller was still owed $27,645.52 of the $59,845.52 purchase price at the time of the hearing under an agreed payment schedule. Complainant sought a 10 year suspension of respondent Black as a registrant under the Act for his participation in this unfair and deceptive practice. Upon consideration of all the circumstances, respondent Black was suspended for one (1) year conditioned upon his right to petition for the termination of the suspension after the expiration of 180 days and his demonstration that the unpaid livestock seller has been paid in full. An order was also entered against both respondents to cease and desist from failing to pay and failing to pay, when due, for livestock purchased.

Allan R. Kahan, for complainant.

Kent F. Hudson, Purvis, Mississippi, for respondent.

Decision and order by William J. Weber, Administrative Law Judge.

DECISION AND ORDER

The complaint alleges that respondents failed to pay for 1,072 head of cattle purchased in eight (8) transactions for a total of $246,443.37 in the first week of December 1985. [1]

Respondents admitted the jurisdictional allegations, admitted the purchase of the cattle, but denied failing to pay and alleged that all debts had been paid. Respondents alleged that they had made every effort to comply with the law and if a violation occurred it was not willfully or knowingly committed.

Trial of the issues took place in Hattiesburg, Mississippi, September 30, 1986. Allan R. Kahan represented complainant and Kent F. Hudson of Purvis, Mississippi represented respondent Black. [2]

At the opening of the hearing counsel agreed that respondents had paid in full, all but one of the sellers, within two or three weeks of the due date.

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[1] Sections 312(a) and 409 of the Packers and Stockyards Act (7USC 213 and 228b) require that operators of stockyards, market agencies and dealers refrain from unfair, unjustly discriminatory or deceptive practices and must pay the sellers "before the close of the next business day following the purchase . . . and transfer of possession" of livestock. Failure to promptly pay or failure to pay, constitute an unfair and deceptive practice, *Lewis v Butz* 512 F2nd 681 (CA8 1975); *In re Mid-States Livestock Inc.*, 37 Agric. Dec. 547 (1977).

[2] Respondent Custom Cattle is in default.

The single transaction which remained unpaid was satisfactorily resolved with the seller by respondent Oscar Black, III and (Custom Cattle Vice-President) Raymond G.Willhoft, Sr., splitting the obligation equally between them, on an agreed payment schedule.

Mr. Willhoft, Sr., and respondent Oscar Black, III had each paid approximately $16,100.00 (totaling $32,200.00 toward the total original obligation of $59,845.52) at trial time.

Respondent Oscar Black, III had previously done business as Black Cattle Company and Black Cattle Order Buyers, Inc., until 1982 when they agreed to the entry of a Consent Decision authorizing a cease and desist order against operating when insolvent, issuing checks in payment for livestock without sufficient funds and failing to pay when due the full purchase price of purchased livestock. Respondents Oscar Black, III and Black Cattle Order Buyers, Inc., were suspended for a period ofsix (6) months from operating under the Packers and Stockyards Act. *In re Oscar Black, III, d/b/a, Black Cattle Company and Black Cattle Order Buyers, Inc., Corp.*, 41 Agric. Dec. 493(1982). CE#8.

After the 1982 suspension expired, respondent Oscar Black, III made arrangements with Raymond G. Willhoft, Sr., for Willhoftto finance Black's re-entry into business. Respondent Custom Cattle Company, Inc., was formed as a successor to Black's former businesses.

Respondent Custom Cattle Company, Inc., was successfully operated until some time in 1985, at which time certain problems (not explained in this record) arose.

Respondents conceded that they were two to three weeks late paying seven of the eight complaint transactions, and had not fully paid the eighth transaction. Approximately $27,600.00 was still owed ($13,800.00 from Black and Willhoft) on the $59,845.52 debt at trial time.

However, respondent Oscar Black, III denies that he was anything more than a nominal "president" and claims that he did not manage, control or operate the business. In addition, respondent Black challenges the appropriateness of the sanction urged by complainant, i.e., 10 year suspension with all but 180 days suspended, if the final transaction has been paid in full.

Respondent Oscar Black, III was, on paper, the president of the corporation and was the person who handled all of the buying, selling and trucking of the cattle. The other officers were involved only in the financial and accounting aspects. They knew nothing and did nothing with reference to the purchase, sale or movement of cattle.

The evidence establishes without any doubt that respondent Oscar Black, III operated, managed, supervised and controlled all livestock transactions that took place, the core operations of the business, from

which the subordinate, albeit vital, financial operations flowed. Both are vital and essential.

Respondent Black was the de facto and de jure president of respondent Custom Cattle Company, Inc. His decision to bow to Willhoft's will was his personal pragmatic decision, and also was his decision as President of Custom Cattle Company, Inc.

Respondent Black contended that in early 1985 he was forced to transfer his 49 percent of the stock to Mr. Willhoft. Black contends that he received no payment or consideration of any kind for the transfer, that he did it (under duress) in order "keephis job" (i.e., keep respondent Custom Cattle Company operating, not lose his financial backing which was vital to buy or sell cattle).

This record establishes no plausible explanation for this forced transfer of stock, if it occurred. There is no documentary support for Black's contention that he transferred this stock to Willhoft. However, for purposes here, it may be an irrelevant factor, whether or not it was done, or why it was done.

Black contends that he was told the banks were "concerned" and wanted the stock *transfer*.

Complainant plausibly and convincingly argues that it is very illogical for the bank to be concerned about the minority stockholders, but apparently unconcerned about the operation, management, supervision and control of all the livestock transactions. Be that as it may, it does not seems to be dispositively relevant whether Black transferred the stock, or did not transfer the stock, as he contends. He continued to direct, control and operate the business in all of its vital buying, selling, trucking operations, the same as before 1985.

Next, in early December 1985, respondent Black contends that he was instructed by Raymond G. Willhoit, Sr., that he (Black) could no longer write checks to pay for livestock as he (Black) always had done. Black contends that Willhoft directed him not to write checks without Willhoft's approval. [3]

Black complied with his instructions from Willhoft and failed to promptly pay for the complaint transactions. [4]

The single remaining unpaid transaction was with Meridian Order Buyers, who desired to hire respondent Oscar Black, III towork for them. Black accepted the position and agreed to personally pay 50 percent of the $59,845.52 that Custom Cattle owed Meridian Order

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[3] Willhoft is Vice-President of respondent corporation, and provided the financial base of the business

[4] Four of the transactions were paid in about three weeks or less and three in less than four weeks

Buyers. Vice-President Raymond G. Willhoft, Sr., also agreed to personally pay off the other 50 percent. (The record does not show *why* the respondent corporation, Custom Cattle Company, did not pay this transaction and left it to the two officers to personally assume and pay.)

Complainant argues that (1) respondent Black's testimony is incredible, (2) that there is nothing to document the transfer of his 49 percent of the stock to Willhoft and, (3) that Black's agreement to pay off 50 percent of the corporate obligation to Meridian Order Buyers proves that in fact Black still owned the 49 percent of the stock.

The record clearly, firmly and unquestionably establishes that Black agreed to pay off half the last obligation in order to get and keep his job – which he highly prizes and appreciates – with Meridian Order Buyers, Inc. (TR p. 36, 66, 67, 71, 72, 76, 78)

Much attention was given to the internal dispute between Willhoft and Black concerning the division of authority within the corporate framework.

This dispute is essentially irrelevant for purposes here. The fact is, respondent corporation purchased the cattle and failed to pay as required. Oscar Black, III was the only one who handled transactions for the corporation and managed, directed, supervised and controlled the key functions – buying and selling cattle – for the respondent corporation. It was his business from beginning to end. He was not merely an employee hired to work for Custom Cattle.

While the record does not satisfactorily explain in any depth the reason for internal policy changes between Black and Willhoft or the purported transfer of stock, the deficiency seems to be of little or no significance here. It is not dispositive here.

If respondent Black yielded to the will of Raymond G. Willhoft, rather than comply with the requirements of the law, that was Black's decision. Understandable, yes, permissible, no.

Complainant argues that respondent Black's testimony is incredible. At first blush this has appeal. However, that appeal fades on close inspection. Respondent Black probably testified truthfully, but it seems more likely that he just did not testify to the *whole* truth. [5]

He quibbled about some things, but he was firm and clear about key points – his knowledge and operation of the business, his deference to Willhoft in financial matters and his need to yield to Willhoft (however, unwise that may have been). Respondent Black's testimony is considered to be basically credible and truthful, though, perhaps incomplete or shaded at points.

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[5] This may occur without fault of the individual witness/party, contingent on questions that were asked (or not asked), tactics/strategy of attorneys, and perceptions of the evidence as it is received at the trial.

The failure to promptly pay is admitted. Respondent Black was the chief operating officer, in fact and on paper.

Respondent Black is also a major stockholder. Respondent Black has failed to present satisfactorily persuasive evidence to prove his claimed transfer of stock to Willhoft in early 1985.

Here the transactions (save one) were all fully paid in less than 30 days. No significant economic loss was sustained by any cattle seller. Respondent Black's failure to see the transactions were promptly paid arose from an internal dispute within respondent corporation (that possibly was beyond his control), and was founded on Black's perceived need to bow to the will of those who financed the operation.

Respondent Black's action was "willful" in a legal sense, for he did what he intended to do with what he thought was justifiable reason. *Butz v Glover Livestock,* 411 US 182, 185(1973); *Silverman v CFTC,* 549 F2nd 28, 31 (CA7 1977). However his failure to see that respondent corporation *promptly* paid for its purchased cattle was illegal.

One cannot ignore the fact that respondent Black had similar violations in 1982. This makes respondent Oscar Black, III a second offender in little over three years.

Taking into consideration that –

(1). seven of the transactions were paid in less than four weeks,

(2). the eighth transaction had prompt arrangements for payments satisfactorily made with the seller,

(3). which resulted in more than half the obligations being paid by trial time (10 months after the transaction),

(4). with no serious economic losses to sellers and,

(5). with respondent Black trying to maintain the business and comply with demands of his key and controlling associates,

it seems appropriate to suspend respondent Black for one (1) year, with the provision that the suspension may be terminated, after 180 days, when the the last transaction is fully paid.

Respondent Black is about 36 year old. He basically testified truthfully. He unwisely bowed to his colleagues orders, and violated the law. His motivation is understandable.

Most of the obligations were quickly (within four weeks) if not "promptly" paid, and satisfactory arrangements exist for the single unpaid transaction.

ᵉ of the transactions (eight) and the aggregate sum
large in terms that are often seen and cited.
de against the bond.
t justify the proposed 10 years suspension. He is
:e of the remaining creditor. Buying and selling

cattle is his main skill. His return to the industry will be difficult enough after a six months absence from skilled employment.

Complainant perceives an "effective" 180 day suspension as appropriate. The contingent draconian 9 1/2 year suspension is not seen to be warranted nor more effective as a deterrent Whatever factors motivated the recommended suspension they are apparent in this record.

For deterrent purposes in this factual situation, the distinction between a 114 month (9 1/2 year) suspended sentenceand a 6 month suspended sentence is not shown here.

Order

Respondent Oscar Black, III, his agents and employees, directly or through any corporate or other device, in connection with his operations subject to the Act, shall cease and desist from failing to pay and failing to pay, when due, for livestock purchased.

Respondent Oscar Black, III is suspended as a registrant under the Act for a period of one (1) year, provided, however, that upon application to the Packers and Stockyards Administration a supplemental order may be issued terminating this suspension at any time after the expiration of one hundred eighty (180) days upon demonstration by respondent that the unpaid livestock seller has been paid in full, and provided further that this suspension may be modified upon application to the Packers and Stockyards Administration to permit respondent Black's salaried employment by another registrant after the expiration of the first one hundred eighty (180) day period.

[This decision and order became final March 12 1987.—Editor.]

In re: OSCAR BLACK, III, AND CUSTOM CATTLE COMPANY, INC. P. & S. Docket No. 6666. Decision and order filed January 21, 1987.

Dealer—Market Agency—Failure to pay when due—Suspension of registration—Default.

Allan R. Kahan, for complainant.

Kent F. Hudson, Purvis, Mississippi, for respondent.

Decision issued by William J. Weber, Administrative Law Judge.

DECISION AND ORDER WITH RESPECT TO CUSTOM CATTLE COMPANY, INC., UPON ADMISSION OF FACTS BY REASON OF DEFAULT

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act.

Copies of the complaint and Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondents by the Hearing Clerk by certified mail. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent Custom Cattle Company, Inc., has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, as they pertain to respondent Custom Cattle Company, Inc., which are admitted by respondent Custom Cattle Company, Inc.'s failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Custom Cattle Company, Inc., hereinafter referred to as respondent Custom Cattle, is a corporation organized and operating in the State of Mississippi Respondent Custom Cattle's business mailing address is Route 3, Box 156, Purvis, Mississippi 39475.

(b) Respondent Custom Cattle is, and at all times material herein was:

(1) Engaged in the business of a market agency buying livestock in commerce on a commission basis and of a dealer buying and selling livestock in commerce for its own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account.

2. (a) Respondent Custom Cattle, on or about the dates and in the transactions set forth in paragraph II of the complaint, purchased livestock and failed to pay, when due, the full purchase price for such livestock.

(b) As of December 23, 1985, respondent Custom Cattle still owed approximately $246,443.37 for the livestock set forth in paragraph II(a) above.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, respondent Custom Cattle have wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213, 228b).

Order

Respondent Custom Cattle Company, Inc., its agents and employees, directly or through any corporate or other device, in connection with its business subject to the Act, shall cease and desist from failing to pay and failing to pay, when due, for livestock purchased.

Respondent Custom Cattle is suspended as a registrant under the Act for a period of ten (10) years, provided, however, that upon applica-

tion to the Packers and Stockyards Administration a supplemental order may be issued terminating this suspension at any time after the expiration of one (1) year upon demonstration by respondent that all unpaid livestock sellers have been paid in full.

The provisions of this order shall become effective on the sixth day after this decision becomes final. Copies hereof shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. § 1.130 *et seq.*).

[This decision and order became final March 12, 1987.—Editor.]

In re: C&M LIVESTOCK, INC. AND RALPH MURINE. P. & S. Docket No. 6805. Order filed March 9, 1987.

Order issued by John A. Campbell, Chief Administrative Law Judge.

ORDER GRANTING MOTION TO WITHDRAW COMPLAINT

For good cause shown, complainant's motion to withdraw the complaint, with leave to reinstate the complaint at a later time, is granted.

In re: W. A. GREEN LIVESTOCK CO., INC. P. & S. Docket No. 6605. Order filed March 16, 1987.

Order issued by Victor W. Palmer, Administrative Law Judge.

SUPPLEMENTAL ORDER

On October 30, 1986, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent as a registrant under the Act for a period of 60 days and thereafter until such time as it demonstrates that it is no longer insolvent.

Respondent has now demonstrated that it is no longer insolvent. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued October 30, 1986, is terminated. The order shall remain in full force and effect in all other respects.

In re: MIGUEL A. MACHADO, d/b/a ESCALON LIVESTOCK MARKET. P. & S. Docket No. 6722. Decision and order filed March 18, 1987.

Andrew Y. Stanton, for complainant.

SPENCER LIVESTOCK COMMISSION CO., and MIKE DONALDSON

Charles J Peluso, Modesto, California, for respondent.

Order issued by William J. Weber, Administrative Law Judge.

SUPPLEMENTAL ORDER

On March 6, 1987, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent as a registrant under the Act until such time as he demonstrated that the deficiency in his custodial account had been eliminated and that he was no longer insolvent.

Respondent has demonstrated that he is no longer insolvent and that the deficit in his custodial account has been eliminated. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued March 6, 1987, is terminated. The order shall remain in full force and effect in all other respects.

In re: NORWOOD STOCKYARDS, INC., AND BRANCH LILLY. P. & S. Docket No. 6763. Decision and order filed March 12, 1987.

Order issued by Dorothea A. Baker, Administrative Law Judge.

SUPPLEMENTAL ORDER

On February 10, 1987, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent as a registrant under the Act "for a period of twenty-eight (28) days and thereafter until it demonstrates that the deficit in its custodial account has been eliminated.".

The corporate respondent has demonstrated to the satisfaction of the Packers and Stockyards Administration that as of February 24, 1987, the deficit in its custodial account was eliminated. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued February 10, 1987, will be terminated after the expiration of the twenty-eight day period. The order shall remain in full force and effect in all other respects.

In re: SPENCER LIVESTOCK COMMISSION CO., AND MIKE DONALDSON. P. & S. Docket No. 6254. Decision and order filed March 19, 1987.

Engaging in an act which operates as a fraud or deceit upon any person—Misrepresenting to principals original purchase prices, weights, or shrinkage allowance—Issuing invoices showing false entries—Inserting or failing to insert information which results in false record—Collecting payment from principals based on false invoices—Failing to provide original scale tickets and purchase invoices upon request—De-

stroying accounts and records—Suspension of registration—Civil penalty.

Summary: The Judicial Officer affirmed Judge Weber's order suspending respondents' registration for 10 years, assessing a $30,000 civil penalty, and ordering respondents to cease and desist from various practices relating to their collecting payment from principals (for whom they bought livestock on a commission basis) on the basis of falsely increased prices and weights, and destroying records that were required to be kept under the Act, the regulations and two prior cease and desist orders. Complainant must prevail by a preponderance of the evidence. The evidence proves clearly that respondents were purchasing livestock for their principals on a $ 50¢ per cwt commission basis and, therefore, they were required to account to their principals on the same prices and weights (including shrink) at which respondents purchased the livestock. The fact that the figures under the heading "PRICE" on respondents' invoices to the principals are not really the price that was charged per cwt, but are, rather, the average cost of the livestock, is strongly indicative of an agency arrangement. Respondents will not be relieved from stipulations filed before and during the hearing merely because they did not know how they would be used by the Judicial Officer. To reopen the hearing for additional evidence, respondents must show that the evidence was newly discovered. Where there is an express agreement for an agency relationship, there is no need to consider whether other circumstances point in the direction of an agency relationship. Large advances by the principals to respondents, daily telephone contact with the principals, and pricing livestock in "odd" amounts, e g., $60.64 per cwt, are indicative of an agency relationship. An order buyer's commission is not separately stated in about half of the livestock commission transactions. The fact that the principals charged back to respondents for death loss occurring during transit is not indicative of a dealer arrangement since respondents had no real financial risk, but merely handled the paperwork incident to the insurance. The fact that respondents paid for the livestock and expenses and were reimbursed by the principals is not inconsistent with an agency relationship. The ALJ's determination as to the credibility of the witnesses is entitled to great weight. A person who buys livestock on commission is a market agency; the dictum in *Solomon Valley Feedlot v Butz*, that such person is a dealer, is erroneous. Respondents' past history of similar violations supports a 10-year suspension here. Defrauding principals in fiduciary transactions is one of the most serious violations of the P&S Act It is impossible even for an experienced feedlot operator to compare in a precise manner the prices of livestock purchased for him and those described in market news reports. If a violator's customers are satisfied, that does not reduce the sanction for violations. At least some types of violations require no proof of predatory intent or proof that the practice is likely to result in injury to competition. Where Congress has not imposed any maximum limit on the suspension period, under the standard of reasonableness, no maximum limit should be imposed by interpretation. Since Judges have widely divergent views as to what punishment should be imposed in criminal cases, they should not substitute their views for that of the agency as to what suspension period is "reasonable." The statutory criteria for determining civil penalties should not be used in determining suspension periods. Severe sanctions imposed under the Act in recent years summarized. Respondents knowingly violated the Act, but ignorance of the law is not a mitigating circumstance. USDA sanction policy clarified and expanded. USDA sanction policy clarified to make *Farrow v. USDA*, which set aside a 45-day suspension order, moot, since it is made clear that the Department imposes severe sanctions for repeated violations or violations regarded by the administrative officials and the Judicial Officer as serious, irrespective of whether they are in fact serious (i.e., regarded by a reviewing court as serious). The sanction is the same irrespective of whether unlawful conduct was done intentionally. A respondent has

the burden of introducing evidence to show that a civil penalty would affect his ability to remain in business. If the violation is serious enough, a civil penalty may be imposed that would adversely affect the violator's ability to continue in business If the civil penalties are increased because the court sets aside the 10-year suspension order, respondents would be permitted to pay the penalties over a period of years

Jory M. Hochberg, for complainant.

Dean Miller, Caldwell, Idaho, for respondent.

Initial decision by *William J. Weber, Administrative Law Judge.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

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Preliminary Statement--This Is the Most Important Case to the $38 Billion Livestock Industry Ever Brought Under the Packers and Stockyard Act.

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).* An initial Decision and Order was filed on April 17, 1986, by Administrative Law Judge William J. Weber (ALJ) suspending respondents' registration under the Act for 10 years, assessing a $30,000 civil penalty, and ordering respondents to cease and desist from various practices relating to their collecting payment from principals (for whom they bought livestock on a commission basis) on the basis of falsely increased prices and weights, and destroying records that were required to be kept under the Act, the regulations and two prior cease and desist orders.

This case is of enormous importance to the $38.3 billion ** livestock industry in the United States. It is the most important case ever brought in the 66-year history of the Packers and Stockyards Act.

This case tests the outer limits of the Secretary's authority to suspend "for a reasonable specified period" a registrant who has violated the Act (7 U.S.C. § 204). The 10-year suspension of respondents' registration is twice as long as the longest suspension period previously imposed in a litigated case under the Act.

This is a perfect test case. Respondents concede that they arbitrarily increased the prices (by $34,649.64) and weights (by 8,131 pounds) in the 17 livestock transactions at issue here. The principal issue is whether they were acting as a dealer (speculator), and had a right to charge what the traffic would bear, or whether, as the ALJ and I have found, they were acting in a fiduciary capacity on a 50c per cwt commission basis, owing the highest degree of loyalty to their principals. The evidence here, including undisputed documentary evidence ("smoking guns"), proves beyond the shadow of a reasonable doubt that respondents were acting in a fiduciary capacity on a 50c per cwt commission basis.

The three livestock feeders who were defrauded in this case (Donald E. Schaake, Dick Van de Graaf, and Arvid Monson) dealt personally with respondent Mike Donaldson, who is president, manager and at least 70% owner of respondent Spencer Livestock Commission Co.

In 1977, Spencer Livestock Commission Co. consented to a 21-day suspension of its registration and a cease and desist order based on allegations that Spencer (with Mike Donaldson as president and princi

* *See generally* Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 3 (1981 and 1986 Supp.), and Carter, *Packers and Stockyards Act*, in 10 Harl, Agricultural Law, ch. 17 (1980).

** Statistical Reporting Service, USDA, *Meat Animals, Production, Disposition, and Income*, 1985 Summary 3 (Mt. An. 1-1, April 1986).

pal shareholder) falsely increased weights and prices in livestock transactions (CX 2, 3).

In 1979, Mike Donaldson was fined $5,000 and placed on 3 years' probation after being found guilty on 16 counts involving fraudulent weight increases in livestock transactions.

In 1980, Mike Donaldson and Mountain States Cattle Company (of which Mike Donaldson was allegedly vice president, 20% owner, and responsible for its direction, management and control) consented to a suspension of their registrations for 1 year, 7 months of which was held in abeyance, and a cease and desist order based on allegations that they falsely increased weights in livestock transactions.

Respondents' violations found here are of the same general nature as those involved in the three prior actions, they were committed during Mike Donaldson's probationary period resulting from his criminal convictions, and they involve cheating principals out of about $40,000 in fiduciary transactions. Hence this case is a perfect case to test the Secretary's authority to issue a 10-year suspension order.

On June 5, 1986, respondents appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. << 556 and 557 has been delegated (7 C.F.R. < 2.35).*** On July 15, 1986, the case was referred to the Judicial Officer for decision.

Oral argument before the Judicial Officer, which is discretionary (7 C F R. § 1.145(d)), was requested by respondents, but is denied inasmuch as the issues are not complex, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

However, on November 6, 1986, the Judicial Officer afforded the parties the opportunity to file an additional brief with respect to whether an affirmative-action cease and desist order should be issued in this proceeding. On December 3, 1986, and January 7, 1987, the Judicial Officer filed a tentative draft of sections I and II(B)(2)(a)-(c), pages 37-88, 104-126, *infra*. The discussion in those sections is, with very minor changes, identical to the tentative draft submitted to the parties (except for obvious additions responding to respondents' brief). As a result of the tentative draft, respondents filed a motion to reopen the hearing and requested that they be relieved from the stipulations of

*** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed Reg 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program (December 1962-January 1971)).

fact that they entered into before and during the hearing. For the reasons discussed below, the motion and request are denied.

Based upon a careful consideration of the entire record, the ALJ's findings and conclusions are adopted as the final decision in this case, with changes too minor to itemize (except that the last paragraph of Findings 2 and 6, under the heading "E. Identificational, Jurisdictional, Historical and Additional Credibility Findings" (Initial Decision at 21–22), were added by the Judicial Officer). Additional conclusions by the Judicial Officer follow the ALJ's conclusions. No affirmative-action cease and desist order is regarded as necessary.

AMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

Preliminary Statement

This matter evolved [1] to a single basic issue: whether certain cattle transactions were grounded in an agreement with respondents Spencer Livestock and Mike Donaldson acting in a "dealer" role, buying and selling cattle as a speculator, or as a "market agency" buying cattle on a commission basis.

The evidence points to commission transactions, not dealer/speculative transactions.

While respondents presents contrary evidence, the record supports complainant's allegations. The persuasiveness, expertise, and credibility of complainant's witnesses were clearly superior to respondent's witnesses.

Basically, the strong and persuasive credibility of the feedlot operator's testimony describing their relationship with respondents is a keystone factor here. They were not "disgruntled", as characterized by respondents, but were aggrieved.

Next, the careful, thorough and detailed documentation by complainant's investigators clearly points to commission transactions, rather than a dealer's speculative transactions.

Also, complainant's case is buttressed by respondent Donaldson's acknowledged willingness to allow misconceptions to exist - - - if he did not actually create them - - - concerning whether he was selling cattle to the feedlot operators as a speculating dealer or buying on their behalf as a commission buyer.

The industry experience and expertise of respondents' witnesses were much less impressive than complainant's witnesses. The interpretations and explanations offered by respondents' experts do not harmonize will with accepted industry practices.

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[1] Both counsel should be commended for their skill in preparation and presentation here. A set of complex issues were resolved by counsel, to the ultimate benefit of all parties, without any apparent sacrifice or advantage to either party. (TR 24-25, 455).

It seems very unlikely that feedlot operators would advance hundreds of thousands of dollars to a speculating cattle dealer to purchase cattle on their behalf.

To the contrary, it seems far more probable and reasonable that feedlot operators would be much more likely to advance money to a cattle buyer operating as their agent, purchasing for them on a commission basis.

It was the almost universal practice over decades for the feedlot operators to purchase cattle only through commission buyers or employee order buyers, rarely, if ever, through dealers.

The feedlot operators contemporaneously demanded documentation from respondents to verify the respondents' purchase costs and expenses. This consistent with buyers buying through a commission buyer.

Full payment to respondent was delayed in one instance until "some documentation" was received concerning respondents' purchase costs and expenses. The buyers' contentions were consistent with their behavior, i.e., they were buying through a commission buyer, not a dealer.

Respondent Mike Donaldson did not challenge the demands for verification of his costs and expenses (the small extent that he provided it), although someone acting as a speculating cattle dealer would be expected to promptly deny/refuse such information to buyers as "none of their business."

Respondents did not act as a speculating dealer would ordinarily act. Nor did respondents do anything to correct the apparent "misunderstanding" of feedlot operators.

Respondents destroyed records [2] concerning their purchases (except those necessary to clear Customs) contrary to their own interests and the advice of their accountant to maintain all records for possible income tax audits. Further, and more seriously here, respondents ignored legal obligations to maintain such records.

Respondents actively tried to - - - and succeeded for a time - - - block the investigation of the Canadian side of these transactions.

Concealing the Canadian records concealed prices and weight increases respondent billed to his purchasers, actions in violation of a commission buyer's duty.

Further, failing to pass on agreed "shrinkage" from the purchase weight would violate a commission buyer's duty as well as a dealer's

[2] Only enough records were kept by respondent Mike Donaldson to process the cattle through Customs. The bookkeeper for respondent Spencer Livestock told the investigator that no Canadian records were available and the investigator would have to see Mike about the Canadian side of the transaction. Respondent Mike Donaldson said the records were destroyed, not kept.

duty, if the resale agreement required the dealer to sell on his original purchase weights.

Price increases on resale of cattle by a speculating dealer would be the legitimate and expected goal of a dealer. But price increases by a commission buyer would be illegal.

It is uncharacteristic of a speculating dealer to sell cattle at odd pricing figures, e.g., $64.36 cwt., as was done here.

On the other hand, it is characteristic of a speculating dealer to sell cattle at even figures, e.g., $64.00, and $64.50, which was not done here.

The credibility of respondent Mike Donaldson was, at best, weak.

Additional particular findings follow, in large measure taken from complainant's well-written, record-supported brief.

A. Transactions with Sam Cattle Co. and Monson & Sons Cattle Co.

1. Sam Cattle Company and Monson & Sons Cattle Company, hereinafter collectively referred to as Monson, were at all times material corporations owned and operated by Arvid Monson and his family and engaged in the business of feeding livestock in the State of Washington. (TR 357-60)

2. Respondent Donaldson had purchased livestock on a commission basis for Monson since 1974. (TR 369-70)

3. On or about March 9-12, 1982, respondents purchased 144 head of livestock at a purchase weight of 152,605 pounds and shipped these livestock to Monson. Respondents paid $95,460.08 for the purchase and for all the direct and documentable expenses incidental to the purchase, transportation and importation of these livestock. Respondent billed Monson $98,824.50 for the livestock. After an adjustment of $686.46 was made for one dead, the amount collected by respondents from Monson for these livestock was $98,138.04. (STIP 1; CX 8-11)

4. On or about March 12, 1982, respondents purchased 48 head of livestock at a gross weight of 47,180 pounds, less a 5.5% shrinkage allowance, for a purchase weight of 44,585 pounds and shipped these livestock to Monson. Respondents passed on only 4% shrink of these livestock to Monson in that respondents billed and collected from Monson for these livestock on the basis of 45,292 pounds. (CX 12-15; TR 153-203; Oral Stipulations of Counsel, TR 444-46)

5. On or about March 8-12, 1982, respondents purchased 318 head of livestock at a purchase weight of 257,165 pounds and shipped these livestock to Monson. Respondents paid $150,501.45 for the purchase and all the direct and documentable expenses inciden

tal to the purchase, transportation and importation of these livestock. Respondents billed Monson $155,345.66 for the livestock. After an adjustment of $498.90 was made for one dead, respondent s collected $154,846.76 for the livestock. (CX 12-15; TR 153-203)

6. On or about April 5, 1982, respondents purchased 75 head of livestock at a purchase weight of 54,150 pounds and shipped these livestock to Monson. Respondents paid $32,394.98 for the purchase and for all the direct and documentable expenses incidental to the purchase, transportation and importation of these livestock. Respondents billed and collected from Monson $32,836.56 for the livestock. (STIP 2; CX 16-20)

7. On or about April 5, 1982, respondents purchased 226 head of livestock at a purchase weight of 154,567 pounds and shipped these livestock to Monson. Respondents paid $90,496.44 for the purchase and for all the direct and documentable expenses incidental to the purchase, transportation and importation of these livestock. Respondents billed Monson $93,689.62 for these livestock. After an adjustment of $414.57 was made for one dead, respondents collected $93,275.05 from Monson for these livestock. (STIP 3, CX 20-23)

B. Transaction with Van de Graaf Ranches, Inc.

1. Van de Graaf Ranches, Inc., hereinafter referred to as Van de Graaf, is and at all times material was a corporation owned and operated by Dick Van de Graaf and his family and engaged in the business of feeding livestock in the State of Washington. (TR 283-87)

2. Respondent Donaldson had purchased livestock on a commission basis for Van de Graaf since the early 1970's. (TR 290-91)

3. On or about March 3 and 5, 1982, respondents purchased 272 head of livestock at a purchase weight of 270,457 pounds and shipped these livestock to Van de Graaf. Respondents paid $158.940.39 for the purchase and for all th e direct and documentable expenses incidental to the purchase, transportation and importation of these livestock. Respondents billed and collected $161,817.79 from Van de Graaf for these livestock. (STIP 5, CX 25-28)

4. On or about March 5-9, 1982, respondents purchased 585 head of livestock at a purchase weight of 638,901 pounds and shipped these livestock to Van de Graaf. Respondents paid $396,535.34 for the pur-

chase and for all the direct and documentable expenses incidental to the purchase, transportation and importation of these livestock. Respondents billed Van de Graaf $404,786.56 for these livestock. After an adjustment of $2,669.48 was made for f our dead, respondents collected $402,117.08 from Van de Graaf for these livestock. (STIP 6; CX 29-32)

5. On or about March 11, 1982, respondents purchased 98 head of livestock at a purchase weight of 88,071 pounds and shipped these livestock to Van de Graaf. Respondents paid $52,450.69 for the purchase and for all the direct and documentable expenses incidental to the purchase, transportation, and importation of these livestock. Respondents billed and collected $53,664.24 from Van de Graaf for these livestock. (STIP 7, CX 33-36)

6. On or about March 11, 1982, respondents purchased 222 head of livestock at a purchase weight of 205,594 pounds and shipped these livestock to Van de Graaf. Respondents paid $126,686.56 for the purchase and for all the direct and documentable expenses incidental to the purchase, transportation and importation of these livestock. Respondents billed and collected $131,097 from Van de Graaf for these livestock. (STIP 8, CX 37-40)

7. On or about April 16, 1982, respondents purchased 311 head of livestock at a gross weight of 255,790 pounds, and shipped these livestock to Van de Graaf. One of these head was rejected at the Canadian border by inspection services for the United States Department of Agriculture. Accordingly, 310 head at a gross weight of 254,968 less a 4% shrink allowance resulting in a purchase weight of 244,769 pounds were ultimately delivered to Van de Graaf. Respondents billed and collected for these 310 head from Van de Graaf on the basis of a purchase weight of 249,878 pounds, or 5,109 pounds more than their actual purchase weight. (CX 69-72; TR 444-55, 489-99)

C. Transactions with Schaake Packing Company

1. Schaake Packing Co., hereinafter referred to as Schaake, was at all times material a corporation owned and operated by Donald Schaake and his family and engaged in the business of feeding livestock and purchasing livestock for slaughter in the State of Washington. (TR 204-08)

2. Respondent Donaldson had purchased livestock on a commission basis for Schaake since at least the early 1970's. (TR 213-15)

3. On or about March 8 and 9, 1982, respondents purchased 144 head of livestock at a purchase weight of

151,601 pounds and shipped these livestock to Schaake. Respondents paid $95,560.89 for the purchase and for all the direct and documentable expenses incidental to the purchase, transportations and importation of these livestock. Respondents billed and collected $97,242.97 from Schaake for these livestock. (STIP 9, CX 41-44)

4. On or about March 9, 1982, respondents purchased 46 head of livestock at a purchase weight of 49,560 pounds and shipped these livestock to Schaake. Respondents paid $31,186.21 for the purchase and for the direct and documentable expenses incidental to the purchase, transportation and importation of these livestock. Respondents billed and collected $31,926.23 from Schaake for these livestock. (STIP 10, CX 45-48)

5. On or about March 12, 1982, respondents purchased 133 head of livestock and shipped these livestock to Schaake. Respondents purchased these livestock at a gross weight of 154,310 pounds with a shrinkage allowance of 5.5% for an actual purchase weight of 145,823 pounds. Respondents passed on only a 4% shrinkage allowance in that respondents billed and collected for these livestock from Schaake on the basis of a weight of 148,138 pounds. (CS 49-52; TR 459-64; Oral Stipulations for Counsel on TR 444-446, 453-455)

6. On or about March 26, 1982, respondents purchased 172 head of livestock at a purchase weight of 127,015 pounds and shipped these livestock to Schaake. Respondents paid $69,786.65 for the purchase and for all the direct an d documentable expenses incidental to the purchase, transportation and importation of these livestock. Respondents billed and collected $76,307.56 from Schaake for these livestock. (STIP 11, CX 53-56)

7. On or about March 29, 1982, respondents purchased 73 head of livestock at a purchase weight of 55,815 pounds and shipped these livestock to Schaake. Respondents paid $35,682.54 for the purchase and for all the direct and documentable expenses incidental to the purchase, transportation and importation of these livestock. Respondents billed and collected $36,713.37 from Schaake for these livestock. (STIP 12, CX 57-60)

8. On or about March 26 and 29, 1982, respondents purchased 277 head of livestock at a purchase weight of 230,912 pounds and shipped these livestock to Schaake. Respondents paid $143,966.36 for the pur-

chase and for all the direct and documentable expenses incidental to the purchase, transportation and importation of these livestock. Respondents billed Schaake $151,847.73 for these livestock. After an adjustment of $548.44 was made for one dead, respondent collected $151,299.29 from Schaake for these livestock. (STIP 13, CX 61-64)

9. On or about March 30 and April 8, 1982, respondents purchased 217 head of livestock at a purchase weight of 149,574 pounds and shipped these livestock to Schaake. Respondents paid $87,412.98 for the purchase and for all t he direct and documentable expenses incidental to the purchase, transportation and importation of these livestock. Respondents billed and collected $88,966.61 from Schaake for these livestock. (STIP 14, CX 65-68)

10. Prior to these transactions, Schaake gave respondents its draft book and authorized respondents to draw drafts on it for both advances and final payments for livestock. (TR 225-230; CX 44, pp. 2-5; CX 56, pp. 2-4; CX 68, pp. 1-2)

D. General Findings

1. In connection with these transactions, Monson, Van de Graaf and Schaake paid advances of several hundreds of thousands of dollars to the respondents for the purchase of livestock. (TR 230, 295-96, 378, 393; CX 11, p. 6; C X 19, p. 6; CX 28, p. 3; CX 32, p. 3; CX 44, p. 2; CX 48, p. 1; CX 60, p. 1; CX 72, pp. 3-4)

2. In connection with these transaction, respondents informed Monson, Van de Graaf, and Schaake that respondents would bill and collect for the livestock on the basis of the monetary exchange rate which respondents obtained a t the time respondents exchanged the money. (TR 223-24, 372, 391-92; CX 44, p.7)

3. In connection with these transaction, respondents communicated with Monson, Van de Graaf and Schaake on a daily basis. (TR 219-44, 296-314, 391)

4. The customary commission rate paid to a market agency buying livestock on a commission basis in respondents' trade area is $.50 per cwt. (TR 211, 289, 367)

5. It is the custom in the livestock industry for a market agency purchasing livestock on a commission basis to account to his principal on the basis of the actual weights, prices and shrinkage allowances at which he purchased the livestock. (TR 238-39, 277, 298, 299-300, 381-82)

6. It is the custom if the livestock industry for the trucker to stand the risk of loss for dead or crippled livestock and to obtain insurance against such risk of loss. (TR 275-76, 327-28, 331-34, 426, 427)

7. In connection with these transactions, the Canadian sellers of the livestock insured the livestock purchased by respondents and credited respondents' account for livestock which subsequently died or were crippled. (TR 417-26; CX 13, pp. 3, 5; CX 42, pp. 1, 5; CX 46, p. 1; CX 66, p. 1)

8. In connection with these transactions, the large majority of the purchase invoices issued by the Canadian sellers to respondents show the livestock being sold by the Canadian sellers to Monson, Van de Graaf and Schaake. (CX 9, 13, 17, 21, 26, 30, 34, 38, 42, 46, 50, 54, 58, 62, 67, 70)

9. In connection with these transaction, the customs papers, brand papers and inspection papers necessary for the transportation of the livestock from Canada to Monson, Van de Graaf and Schaake were prepared by the Canadian sellers. (TR 770; CX 10, 13A, 14, 18, 22, 27, 31, 35, 39, 43, 47, 51, 55, 59, 63, 67, 71)

10. It is common for a market agency purchasing livestock on commission to include the rate of commission and the total commission amount in the priced per hundredweight and the total cost of the livestock on the accountings issued to the agent's principals, rather than separately stating these amounts. (TR 25-51, 383, 475)

11. In connection with these transaction, respondents billed and collected from Monson, Van de Graaf and Schaake in excess of $30,000 over the amounts they would have been entitled to collect as a market agency purchasing livestock on a commission basis. (CX 8, 12, 16, 20, 25, 29, 33, 37, 41, 45, 49, 53, 57, 61, 65, 69)

12. In connection with these transactions, respondents failed to provide Monson, Van de Graaf and Schaake with purchase invoices, scale tickets and other documents showing the actual weights, prices and shrinkage allowances at which respondents had purchased the livestock. (TR 293, 299-300, 342, 354, 383)

13. In connection with these transactions, respondents failed to keep and maintain accounts, records and memoranda which fully and accurately disclosed their transaction subject to the Act, in that respondents failed to keep and maintain purchase invoices, worksheets, checks, deposit slips, and trucking bills. (TR 30, 45, 501, 508-10, 512-13, 523-24)

14. These transaction were all commission purchases by respondents, not dealer transactions.

15. Monson, Van de Graaf and Schaake acted contemporaneously in a manner consistent with commission buyers from respondents, and respondents knew and encouraged that belief, if they did not actually create it.

E. Identificational, Jurisdictional, Historical and Additional Credibility Findings

1. Spencer Livestock Commission Co., hereinafter referred to as respondent Spencer, is a corporation organized and existing under the laws of the State of Idaho. Its business mailing address is P.O. Box 1222, Lewiston, Idaho 83501. (Complaint I(a); Answer II)

2. Respondent Spencer is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce basis and buying and selling livestock in commerce for its own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce. (Complaint I(b); Answer II)

[On September 3, 1974, respondent Spencer's registration with the Secretary of Agriculture was amended to show its business operation as selling on commission, buying on commission, and dealer (buying or selling) (Tr. 102-03 ; CX 1, p. 8). After complainant's investigation, resulting in the present proceeding, began in May 1982 (Tr. 92), respondent Spencer's registration was amended on June 14, 1982, to show its business operation only as a dealer (Tr. 102-03; CX 1, p. 9). A month later, respondent Spencer submitted a further application for registration, providing additional information, but again showing its character of business as a dealer only (Tr. 102-03; C X 1, pp. 10-11).]

3. Mike Donaldson, hereinafter referred to as respondent Donaldson, is an individual whose business mailing address is P.O. Box 1222, Lewiston, Idaho 83501. (Complaint I(c); Answer II).

4. Respondent Donaldson is and at all times material herein was:

(a) President and Manager of respondent Spencer;

(b) Owner of at least 70% of the outstanding stock issued by respondent Spencer; and

(c) Responsible for the direction, management and control of respondent Spencer. (TR 66-67, 699-700).

5. Respondent Donaldson is, and at all times material herein was, a dealer and a market agency within the meaning and subject to the provisions of the Act. (Complaint I(e); Answer II)

6. Respondent Donaldson is, and at all times material herein was, registered with the Secretary of Agriculture as a dealer to buy and sell livestock and as a market agency to buy livestock. (Complaint I(f); Answer II)

[Respondent Donaldson was registered as a dealer (buying and selling) on February 14, 1972 (Tr. 102; CX 1, p. 1). His registration was amended to include "buying on commission" on July 31, 1973 (Tr. 102-03; CX 1, p. 2). His registration continued to show that he was registered as a dealer and buying on commission until his registration became inactive on June 13, 1982 (Tr. 102-03; CX 1, pp. 2-5).]

7. Respondent Spencer first began its operations subject to the Act in 1962 and respondent Donaldson first entered the livestock industry in 1964. In 1974, respondent Donaldson became President and Manager of respondent Spencer. (CX 1, pp. 6-8; TR 49)

8. In July, 1976, a complaint in P&S Docket No. 5326 was filed against respondent Spencer, alleging *inter alia*, that respondent Spencer had purchased livestock on a commission basis and had billed and collected from its principals on the basis of prices and weights which were greater than respondent's actual purchase prices and weights. For the purpose of resolving this proceeding, Mike Donaldson, as President, Manager and majority stockholder of respondent Spencer, signed an answer containing a consent order in which respondent Spencer agreed to cease and desist from the types of practices which had been alleged in the complaint. The order also contained a suspension of respondent Spencer's registration under the Act for a period of 21 days; 36 Agric. Dec. 1022 (1977). (CX 1, pp. 7-8; CX 2, 3)

9. On February 8, 1978, an indictment was filed in United States District Court for the District of Boise, Idaho, CR 78-10097, against Mike Donaldson. The indictment charged respondent Donaldson with making and causing to be made false and fictitious entries on invoices, worksheets and other records required to be kept under the Packers and Stockyards Act in violation of 7 U.S.C. § 222 and 15 U.S.C. § 50. The indictment further charged that the alleged falsification was made to bill and collect for livestock on the basis of fraudulently increased weights. On June 4, 1979, an Order was filed in District Court convicting respondent Donaldson of the offenses charged. This order assessed a $5,000.00 fine against Donaldson and placed

Donaldson on probation for a period of three years. [3] (TR 553-55; Complainant's Offer of Proof CX 4)

10. On December 18, 1979, an administrative complaint was filed against respondent Donaldson in P&S Docket No. 5707. This complaint charged respondent Donaldson with billing and collecting for livestock on the basis of weights which had been fraudulently increased over the weights at which respondent Donaldson had purchased the livestock. On December 8, 1980, a consent decision was filed in this proceeding. 39 Agric. Dec. 1429 (1980). In this consent decision, respondent Donaldson agreed to cease and desist from engaging in the types of practices alleged in the complaint and to keep and maintain specified records. The order also suspended respondent Donaldson as a registrant under the Act for a period of one year [, 7 months of which was suspended]. CX 5, 6)

11. Respondent Mike Donaldson failed to show the credibility, persuasiveness, and integrity necessary to give much weight to his contentions. He shows an indifference to his legal and ethical responsibilities.

12. Respondent Mike Donaldson demonstrated full willingness to allow error/misconceptions/ambiguities favorable to himself to remain undisturbed and uncorrected, if he did not actively create them in the first place. (TR 821 , 822)

13. Respondent Mike Donaldson actively tried to block and frustrate the complainant's inspectors in obtaining information and records from his Canadian sources, for the purpose of concealing purchase price and weight information on the subject cattle transactions.

14. No one in an authority or industry position ever told respondent Mike Donaldson that Canadian purchases of cattle for reshipment to the United States buyers were outside of the jurisdiction of the Packers and Stockyards Act.

15. The record fails to establish or even suggest any bias, prejudice or other evil motive, motivating the testimony of any witnesses appearing against respondent. Respondent's characterization of some witnesses as "disgruntled" is unsupported by the record.

16. Respondents furnished only minimal information/documentation to the purchasers and did not fully inform them, or document the Canadian transactions, as expected/demanded by them, or as required by law.

F. Discussion

[3] The subject transactions in March and April 1982 occurred near the end of that probationary period.

The primary issue is whether respondents were purchasing the livestock in question as a market agency on a commission basis for principals, or as an independent dealer on a speculative basis for resale. (TR 445)

The record is abundantly clear that the respondents had agreed to purchase all of the livestock in question on a commission basis. The record establishes that respondents had transacted business with Monson, Van de Graaf and Schaake for many years. [4] (TR 290-91, 213-15, 368-69) Mr. Monson testified that all of his previous purchases from respondents, with the exception of two or three partnership arrangements with Donaldson, were on a commission basis. (TR 369-70, 393-94, 399-400) Mr. Van de Graaf testified that virtually all of his transactions with respondents called for them to purchase on commission. (TR 287-88, 291) Mr. Schaake testified that with a very occasional exception (TR 219, 252-53), his agreements with respondents always called for them to purchase on a commission basis. (TR 213-14, 217, 233, 252) Hence, the established course of dealing between these parties were clearly principal-agent relationships.

However, one does not have to rely on the past course of dealing between the parties to establish an agency. The evidence is clear that on various occasions the parties discussed the commission to be paid in the transactions in question. Mr. Monson testified at hearing that he orally discussed the commission with respondent Donaldson. (TR 369, 401-02) Various accounting received by Van de Graaf from the respondents specifically state the commission. (CX 28, p. 1; CX 32, p. 1) Moreover, the evidence is uncontested that the telephone notes prepared by Mr. Schaake's accountant during his conversations with Mr. Donaldson and his bookkeeper accurately show the figures and information received from respondents during these telephone calls. (TR 219-244, 281) These memoranda specifically list a $.50 commission. (CX 44, pp. 6, 7; CX 48, pp. 6, 7; CX 52, pp. 6-7) [5]

[4] These buyers feed 50,000 to 100,000 cattle a year, and used 10 to 12 order buyers year-in and year-out to buy cattle. They acquired cattle from a dozen or so western States, and Canada.

[5] Respondents offered an accountant with little or no experience in the actual buying and selling of livestock (TR 655-56) as an expert to testify concerning what these "commission" notations referred to. His opinion that they referred to commissions which respondents paid to another (TR 670-71, 683) must be discounted. His answers reveal his lack of expertise. One may conclude from simple logic that there was absolutely no reason for respondents to itemize their commissions and other expenses paid to their parties if this was a dealer transaction.

Mr Schaake testified that this notation referred to the commission to be paid by his company to respondents.

In addition to the previous course of dealing which was established between the parties and their discussions and other communications concerning the particular transactions in question, there are other clear and unmistakable earmarks of principal–agent relationships in the documents and circumstances surrounding these transactions.

First, the evidence shows that all three feeders gave respondents advances of hundreds of thousands of dollars to purchase the livestock. (TR 230, 295–96, 378, 393, CX 19, p. 6; CX 28, p. 3; CX 32, p. 3; CX 44, p. 2; CX 48, p. 1; CX 60, p. 1; CX 72, pp. 3–4) Even one unfamiliar with the industry should conclude that a businessman would not provide such large sums of money to another businessman to purchase goods for speculative resale. The buyers here said they would not do it. (TR 373, 320–321)

Second, the prices at which respondents were billing the buyers are themselves very strongly indicative of the agency relationship existing between the parties. The evidence is overwhelming that even a single billing at an uneven price, such as $64.76/cwt., is a strong indication of a market agency transaction. Respondents' continuous billings at such prices almost becomes conclusive.

The essence of the market agency relationship is that the agent passes on his actual costs to his principal. Where, as here, the agreement called for the agent to pay incidental expenses directly and then account to his principal for those expenses, the final purchase price per hundredweight at which the agent accounts will likely be uneven. Once the agent has added on his $.50 commission, the agent is not allowed to round off the resulting $64.86 price per cwt. to an even $65.00.

In a dealer transaction, on the other hand, the dealer is entitled to add his expenses and then mark–up the price whatever additional amount the buyer will pay. The record shows that as a practical matter dealers just don't price their livestock as $60.46 or $64.86. A dealer will price it at 60.50 or $65.00. (TR 373–74; 315)

Third, the manner in which respondents accounted for their expenses in these transactions further belies their claim that these were not agency relationships. One need not be an expert to understand why an agent will normally submit a detailed accounting of expenses for a transaction in which the agent pays expenses on behalf of his principal. One would not expect this, however, in a dealer transaction where the buyer has simply agreed to purchase at a stated price. The detailed breakdowns in which respondents itemized various expenses reveal the agency nature of the transactions in question. (CX 28, p. 1, CX 32, p. 1, CX 48, p. 7, CX 56, p. 5; TR 223–24, 231– 41).

Respondents' proposal to bill the buyers at the monetary exchange rate at the time of purchase is another indication of the agency nature of these transaction. (TR 223–24, 307) A buying arrangement which

involves some degree of speculative risk is a characteristic of a dealer transaction. *See, In re Hines*, 35 Agric. Dec. 113 (1976).

involves some degree of speculative risk is a characteristic of a dealer transaction. *See, In re Hines*, 35 Agric. Dec. 113 (1976).

A cattle dealer does not agree to sell livestock at a certain price and then adjust that price at or before delivery if the market or other circumstances dictate an adjustment. That is, a dealer would not agree to sell live stock at some ballpark price to be adjusted according to what monetary exchange rate he ultimately receives. Such an arrangement eliminates speculative risk for the shipper of the livestock [i.e., respondents] and is a further indication of an agency relationship.

Respondents' actions in billing and collecting on weights and prices which were increased and shrinkage allowances which were decreased from the actual purchase prices, weights and shrinkage allowances, in view of their know ledge that the principals expected otherwise, constitutes fraud. It is well settled that such fraudulent billing by an agent is a most serious, unfair and deceptive act and practice in violation of section 312(a) of the Act . *In re Vealy*, 39 Agric. Dec 8 (1979); *In re Collier & Marsh*, 38 Agric. Dec. 954 (1954).

Having agreed to operate as a market agency purchasing livestock on commission, respondents were also required to submit complete and accurate accountings to their principals and to make copies of bills in payment for expense items available to their principals. Sections 201.44 and 201.45 of the regulations provide:

> § 201.44 Market agencies to render prompt accounting for purchases on order.
>
> Each market agency shall, promptly following the purchases of livestock on a commission or agency basis, transmit or deliver to the person for whose account such purchase was made, or the duly authorized agent, a true written account of the purchase showing the number, weight and price of each kind of animal purchased, the names of the persons from whom purchased, the date of purchase, the commission and other lawful charges, and such other facts as may be necessary to complete the account and show fully the true nature of the transaction.
>
> § 201.45 Market agencies to make records available for inspection by owners, consignors, and purchasers.
>
> Each market agency engaged in the business of selling or buying livestock on a commission or agency basis shall, on request from an owner, consignor, or purchaser, make available copies of bills covering charges paid by such market agency for and on behalf of the owner, consignor, or purchaser which were deducted from the gross proceeds of the sale of livestock or added to the purchase price thereof when accounting for the sale or purchase

Respondents' actions in submitting false accountings accomplished the fraud. Thereafter, their actions in destroying invoices and other documents showing their actual expenses served to conceal their wrongdoing and constitute independent violations of section 312(a) of the Act.

Finally, respondents have violated section 401 of the Act (7 U.S.C. § 221). Respondents must be subjected to a very specific recordkeeping requirement by virtue of their failure to keep accounts, records and memoranda which fully and correctly disclose the true nature of all their transactions subject to the Act.

Respondents failed to keep and maintain copies of purchase invoices (TR 31–32), scale tickets (TR 34), trucking bills (TR 35), checks, deposit tickets, and yardage and feed invoices. (TR 35) In addition, respondents failed to keep and maintain worksheets which they prepared showing livestock purchased and sold. (TR 43; CX 80) Without these worksheets, it is impossible to trace livestock purchased by respondents. (TR 508–10)

Complainant requested one of the most severe sanctions to be imposed against a registrant in many years. First, complainant requested a $30,000 civil penalty to insure that the respondents are denied the illegal profits in the proven violations. In fact, as suggested by complainant, the size of respondents' operation (TR 556), the seriousness of the offense (Tr 557–58) and the availability of assets to pay a civil penalty (CX 81–85), would support a greater amount. However, complainant suggested that a greater civil penalty would be of minimal value with these respondents.

Instead, complainant requests suspension terms of ten years for both respondents. While ten years is longer than suspension terms ordered in recent cases, *In re Tedlock*, 36 Agric. Dec. 203 (1976); *In re Fox*, 42 Agric. Dec. 807 (1983); *In re Buchanan*, P&S Docket No. 6133 (November 23, 1983); *In re Wyatt*, P&S Docket No.6145 (March 28, 1984); *In re Powell*, P&S Docket No. 6248 (March 7, 1985); *In re Grain Belt Feeders*, P&S Docket No. 6519 (July 18 , 1985), the relevant consideration in this case support complainant's recommended suspensions, under the severe sanction policy. In addition to the seriousness of the violations involved, respondents' previous history warrants the imposition of a severe sanction.

Administrative and criminal sanction previously imposed (CX 2–6) were apparently insufficient to deter respondents from committing these violations. Respondent Donaldson's criminal conviction for billing on false weights (C X 4, TR 553–554) resulted in a fine and a three-year period of probation. His sentence did not deter these violations. Respondent Spencer's previous suspension of 21 days and respondent Donaldson's previous suspension of one year were similarly ineffective to deter the violations here. Indeed, the proximity in time

of the present violations to these previous cases highlights the need for a substantial sanction.

The inefficacy of previous sanctions imposed must also be considered alongside Mr. Donaldson's demonstrated indifference to the Packers and Stockyards Act. Donaldson testified that he had never bothered to read the orders which he agree to in the previous cases brought against him. Mr. Donaldson readily admitted that he doesn't concern himself with laws or previous orders. Such matters are routinely referred to counsel. (TR 56-58)

In short, respondents present a text-book case of a continuing enforcement problem requiring stern measures for the protection of the industry. The seriousness of these violations, respondents' previous history and blatant disdain for lawful requirements, and the failure of earlier attempts to achieve compliance, all dictate that respondents be removed from the industry for a substantial period as complainant urges.

Others may be deterred from committing violations by this sanction.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents contend on appeal that the ALJ's findings of fact are not adequately supported by the record, and that the sanction is unduly severe. However, there is no merit to either contention. The proof here is beyond the shadow of a reasonable doubt, which far exceeds the required preponderance of the evidence, [6] and respondents' repeated and flagrant violations, when considered along with respondents' past history of similar violations, warrant the severe sanction imposed here. For convenience, actions of respondent Mike Donaldson on behalf of respondent Spencer Livestock Commission Co. are referred to as respondents' actions.

I. Undisputed Documentary Evidence and Stipulations Prove Irrefutably and Mathematically that Respondents' Invoice Price to Schaake as to Two Transactions Involving 144 Head and 46 Head (Invoiced to Schaake as Part of 323 Head) Included Respondents' 50c Per Cwt Commission, and Compel the Inference that Respondents Bought the Remaining 133 Head on a 50c Per Cwt Commission Basis.

Undisputed documentary evidence and stipulations of fact prove irrefutably and with mathematical certainty that respondents' commission of 50c per cwt was included in respondents' invoice price to

[6] *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

Schaake Packing Company, Inc., for 144 head purchased by respondents on or about March 8 and 9, 1982, and 46 head purchased by respondents on or about March 9, 1982 (set forth in Findings 3 and 4 under the heading "C. Transactions with Schaake Packing Company" (Initial Decision at 12–13)), which invoice includes a third lot containing 133 head, for a total of 323 head.

In a nutshell, Schaake's business records contain memoranda made by Claude Johnson, Schaake's accountant, of telephone conversations with respondent Donaldson on March 12, 1982, and with his bookkeeper, Tony Seubert (also spelled Suebert at some places in the record), on March 29, 1982, the first of which expressly states that the "delivered" price of the 323 head invoiced to Schaake included a *50c* commission, and the second of which shows not only the *50c* per cwt commission in *United States funds*, but, also, that the total amount of the commission ($1,746.50) is in *United States funds*, and *relates to all 323 head* weighing 349,299 pounds (or 3,492.99 cwt) ($.50 x 3,492.99 = $1,746.50).

Respondents do not challenge the fact that these memoranda accurately set forth the telephone conversations, but contend that the 50c per cwt commission refers to commissions Donaldson paid someone else. However, the undisputed documentary evidence shows that the commissions paid by respondents to others on the 144-head lot and the 46-head lot were at the rate of 50c per cwt, *75c* per cwt, and *$4* per *head, all in Canadian funds*. Hence the commissions respondents paid to others on these cattle were not *50c* per cwt in *United States funds*.

In addition, the detailed breakdown as to the 323 head set forth in the second memorandum shows how much of the total amount was initially paid for in Canadian funds (by respondents), and then shows the conversion of that amount into United States funds (by dividing by 1.21, the rate of exchange at the time). The breakdown *then* adds three items in United States funds, *viz.*, trucking, duty and (*last*) 50c per cwt commission. Since the commissions paid by respondents to others were in Canadian funds, they were included in the total Canadian-funds cost of the cattle, and the last item, a 50c per cwt commission in United States funds relating to all 323 head, could *only* refer to *respondents'* 50c per cwt commission.

Moreover, respondents have stipulated as to "all" their expenses incident to the purchase of the 144-head lot and the 46-head lot. The stipulations and undisputed documentary evidence, which show "all" of the expenses that respondents incurred incident to the 144 head and the 46 head, account for all of respondents' expenses without leaving any room for an argument that respondents paid a 50c per cwt commission in United States funds to other persons. Accordingly, it is impossible for the 50c per cwt commission in United States funds admitted by

respondents, which relates to the entire 323 head, to refer to anything other than respondents' 50c per cwt commission on the 144 head and the 46 head.

Since these memoranda are "smoking guns," decisive of the case as to these transactions, and fully supportive of Schaake's testimony that Donaldson bought all of the livestock for Schaake involved in this case on a 50c per cwt commission basis, the total factual setting involving these 323 head is set forth in great detail below.

A. Respondents' Invoice to Schaake for 144 Head, 46 Head, and 133 Head, Totaling 323 head Weighing 349,299 Pounds.

Respondents' invoice to Schaake for 144 head, 46 head, and 133 head, totaling 323 head, is reproduced on the next page (CX 44, p. 1; identical to CX 48, p. 1, and CX 52, p. 1).

The invoice dated March 15, 1982 (JO Ref. 1, p. 40), [7] shows that the 323 steers (JO Ref. 14, p. 40) weighed a total of 349,299 pounds (JO Ref. 16, p. 40), with an average weight of 1,081 pounds (JO Ref. 15, p. 40; 349,299 ÷ 323 = 1,081), and a total cost of $226,571.15 (JO Ref. 18, p. 40), or an average cost of $64.86 per cwt (JO Ref. 17, p. 40); $226,571.15 ÷ 3,492.99 = $64.86). The invoice shows that after deducting Schaake's down payment of $180,000 (JO Ref. 19, p. 40), which had been made on March 10, 1982, when Tony Seubert, respondents' bookkeeper at that time (Tr. 40), wrote a draft on Schaake Packing Company to the order of Mike Donaldson for $180,000 (CX 44, p. 2; CX 48, p. 2; CX 52, p. 2), the balance due was $46,571.15 (JO Ref. 20, p. 40).

B. Schaake's Memoranda of Telephone Conversations with Donaldson and Seubert (Respondents' Bookkeeper), Which Are Not Disputed, Show that Respondents' Delivered Price to Schaake for the 323 Steers Included 50c Per Cwt Commission. Undisputed Documentary Evidence and Stipulations with Respect to the 144-Head and 46-Head Portions of the 323 Head Prove Irrefutably and Mathematically that This Commission Could Only Refer to Respondents' 50c Per Cwt Commission.

1. Schaake's Accountant, Claude Johnson, Made Memoranda of Telephone Conversations with Respondent Donaldson and Tony Seubert (Respondents' Bookkeeper), the Accuracy of Which Is Not Disputed.

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[7] Judicial Officer references to specific parts of exhibits consist of numbered arrows, which are numbered consecutively as they would be seen if a ruler were pulled down the page. Some data identified by numbered arrows are not discussed until later in the decision, but numbering them in sequence facilitates locating them.

During the course of complainant's investigation, Keith M. Kienow, then Assistant Regional Supervisor of complainant's Portland Regional Office, photocopied business records kept by a number of persons and firms, including Schaake Packing Company. Included in the business records copied were memoranda made by Claude Johnson, Schaake's accountant, as to telephone conversations with respondent Donaldson and his bookkeeper at the time, Tony Seubert (CX 44, pp. 6-7). [8]

Donald E. Schaake testified that his accountant, Claude Johnson, recorded the information given to Claude Johnson by Mike Donaldson and his bookkeeper at that time, Tony Seubert, in the memoranda received as CX 44, pp. 6-7 (Tr. 221-23).

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[8] CX 44, p. 7, which is a memorandum of the telephone conversation with Tony Seubert, is erroneously marked in the official record as CX 47, p. 7, although it is physically included in the record as the seventh page of CX 44. However, it is obvious from the testimony in the record describing the exhibit (Tr. 219-30) that the exhibit marked CX 47, p. 7, is actually CX 44, p. 7. In addition, CX 44, p. 1, states at the bottom "Page 1 of 7," and the document marked CX 47, p. 7, is the only document included in the record as the seventh page of complainant's exhibit 44. Furthermore, the first page of CX 47, p. 1, states "Page 1 of 6," and there is no document physically included in the record as page 7 of complainant's exhibit 47. Hence, it is quite obvious that the memorandum of the conversation with Tony Seubert marked CX *47*, "Page 7 of 7," is actually CX *44*, "Page 7 of 7."

Respondents' Invoice to Schaake for 323 Head (X 44, p. 1; CX 48, p. 1; CX 52, p. 1)

INVOICE
MIKE DONALDSON
SPENCER LIVESTOCK COMMISSION COMPANY
P O Box 1222
Lewiston, Idaho 83501

DATE 3/5/82

1

Sold To Schaake Pack
Box 128
Ellensburg WA 98926

PURCHASED FROM	NO. HEAD	KIND	AVE. WT		WEIGHT	PRICE	AMOUNT
Calgary	144	strs	1052		151601	64 14	97242 97
2	1			3		4	5
Clyd.	46	strs	1077		49510	64 41	31926 23
6				7		8	9
Lloyd	133	strs	1113		148138	65 75	97401 95
10				11		12	13
	323		1081		349249	64 82	226571.15
14		15		16		17	18
					Down Payment <		180,000
						19	
							41,571.15
						20	

By

TOTAL

Respondents presented no evidence challenging the accuracy of the memoranda made by Claude Johnson of the telephone conversations, and their briefs do not challenge the accuracy of the information set forth in the memoranda. Although Claude Johnson was not called as a witness because of a lengthy vacation, respondents' attorney stipulated that Claude Johnson's testimony would have been the same as that of Mr. Schaake in this respect. Specifically, the stipulation is as follows (Tr. 281-83):

> MR. HOCHBERG: Judge, at this time I would like to just make it known that Mr. Miller [respondents' attorney] and I have discussed the stipulation arising from Mr. Schaake's -- well, following Mr. Schaake's testimony and the stipulation would be that if Claude Johnson, who Mr. Schaake has testified was his accountant during this period of time and still is his accountant were called to testify in this proceeding, Mr. Johnson would offer the same testimony as Mr. Schaake concerning the manner in which he received the information and figures from Mike Donaldson and Tony Seubert, which appear on the records which Mr. Schaake has testified that Mr. Johnson created.
>
> Mr. Miller has also assured me that having interviewed his clients, his witnesses, and his witnesses will not be disputing Mr. Schaake's account of how the information on those notes was taken down. So that basically the Complainant doesn't have to be concerned with any adverse inferences that Claude Johnson didn't testify in this proceeding. It is basically for the convenience of Mr. Johnson, who, as I say, is Mr. Schaake's accountant.
>
> MR. MILLER: That is agreeable, Judge. Mr. Schaake has told us or related to us that Mr. Johnson had a vacation planned for a substantial length of time out of this area and as a convenience to Mr. Schaake and his employee we are happy to arrange it so Mr. Johnson doesn't have to be here.

2. Memorandum of Telephone Conversation in Which Respondent Donaldson Admits that His "Delivered" Price to Schaake for the 323 Head Included 50c Commission. Respondents' Contention that This Refers to 50c Commission Paid by Donaldson to Others Is Not Credible.

A photocopy of the memorandum by Claude Johnson of Mike Donaldson's telephone conversation relating to the 323 steers delivered to Schaake is reproduced on the following page (CX 44, p. 6).

Shaake's Memorandum of Donaldson's Telephone Call (X 44, p. 6; CX 48, p. 6; CX 52, p. 6)

4:50

21 → 3/14/82

22 → Mike Donaldson

23 → 323 str 24 → 349,299 net

25 → 1081 26 → $226,571.45

27 → 64.86 28 → delivered

29 wts 333,230

30 → 4.6%

31 → duty & .50 com included

3 Piste out 3/12
1 Parkland should be here by 6 pm Sat

3 more to load out Sunday

snow storm & road closed

Mr. Schaake testified that the information at the top of the memorandum (JO Ref. 21, 22, p. 44) shows that Mike Donaldson called Claude Johnson at 4:50 p.m. on March 12, 1982 (Tr. 222–23). The number of steers shown on the memorandum, 323 (JO Ref. 23, p. 44), and their weight, 349,299 pounds (JO Ref. 24, p. 44), is the same as the number and weight shown on respondents' invoice to Schaake (JO Ref. 14, 16, p. 40), as is the average weight, 1,081 pounds (JO Ref. 25, p. 44; JO Ref. 15, p. 40). Similarly, the average cost shown on the memorandum, $64.86 (JO Ref. 27, p. 44), is identical to that stated on respondents' invoice to Schaake (JO Ref. 17, p. 40). The total cost stated in the memorandum, $226,571.45 (JO Ref. 26, p. 44), is just 30c more than the cost stated on the invoice, $226,571.15 (JO Ref. 18, p. 40), an obvious (and trivial) error. [9]

The memorandum states under the total cost figure "delivered" (JO Ref. 28, p. 44), "duty & .50 com included" (JO Ref. 31, p. 44). Both Mr. Schaake and respondent Donaldson testified that "delivered" means the price delivered to the buyer, with all costs included (Tr. 215, 223–27, 804). Hence the memorandum records respondent Donaldson's admission that the "delivered" price to Schaake for the 323 steers, $226,571.45, included duty and 50c commission.

Although this memorandum is not irrefutable, as is the more detailed memorandum discussed in the next subsection, it is strong and compelling evidence supporting Mr. Schaake's testimony that he dealt with respondents on a 50c commission basis.

Mr. Kienow testified as an expert witness for complainant that the reference in the memorandum to 50c commission included would refer to respondents' commission of 50c per cwt (Tr. 478–81). Mr. Kienow's testimony, in this respect, is consistent with my own view, based on briefing and arguing Packers and Stockyards Act cases in appellate courts for 10 years, directing the Packers and Stockyards Act regulatory program for 8 years, and deciding cases under the Packers and Stockyards Act for 15 years.

However, Mr. Frye, a CPA who works for a number of livestock firms, testified that the reference to a commission would refer to a commission Donaldson paid to someone else. He testified (Tr. 670–71, emphasis added):

> Q. With respect to these documents that you have reviewed, you recall, don't you, that in the course of reviewing them, you came across entries that said "commission"?

[9] The in weights, 333,230 pounds (JO Ref. 29, p. 44), and the actual shrink of the steers, 4.6% (JO Ref. 30, p. 44), were recorded by Mr. Schaake after the steers arrived and were weighed at his feedlot (Tr. 221–22).

A. Yes, sir. I testified yesterday I noticed one that says "com.," to mean commission. I don't remember a dollar amount on the exhibits that I testified to yesterday.

Q. You recall, then, seeing a 50 cent seal then on one of these documents? One or several of these documents?

A. I recall seeing the commission on one or several. I don't know that it was the 50 cents. It could have been.

Q. This didn't lead you to wonder whether this was a market agency transaction?

A. No, sir. The commissions that were on those documents are what I call above the line of cattle acquiring cost, not commissions below the line after we total up the cost of acquiring the cattle. The buyer of the cattle [Donaldson] puts the cattle, price, *he puts a commission that he pays to someone else*, he puts his freight, a feed, a brander's help, if that's the situation. He acquires his costs, reports to his principal the sum of those costs with the head cost and maybe the price per head count, and then his commission comes off after that. You report what you paid, not what you're getting. What you're getting comes below the totaling of those other costs. Those which I saw yesterday and which I have just now testified to, that is up there right below a few head of cattle. There's two entries up there, one of them a commission. And now we list cattle down here. If this was an agency commission, the commission is below here. That's below the line cost, an acquiring cost.

Q. When you see an entry labeled "commission", does that cause you to believe that this may be a market agency transaction?

A. No, sir, unless it's below the line, below all the costs of acquiring.

Nonetheless, Mr. Frye conceded that in a dealer transaction, there is no reason for a dealer to tell the person to whom he is selling livestock what commissions or other expenses the dealer paid. Mr. Frye testified (Tr. 683):

JUDGE WEBER: Why would someone purchasing cattle from a dealer be concerned about commissions the dealer may have had, expenses the dealer may have had, arrangements the dealer may have had with the people that he purchased cattle from? It is not an ultimate purchaser's business, is it?

Do you see what I am driving at? The purchaser under my hypothesis gets a price from the dealer and he either agrees to pay that price or he doesn't, and what the dealer's prior costs or arrangements were, aren't really material or relevant, are they?

THE WITNESS: No, sir.

Similarly, respondent Donaldson testified that the reference to commissions could have meant a commission he paid to somebody else, although he could offer no explanation as to why commissions paid to somebody else would be of concern to feeders (such as Schaake). Mr. Donaldson testified (Tr. 819-20; emphasis added):

> JUDGE WEBER: . . . In some instances in the exhibits where people had asked you for documentation, they made notes on information provided by phone and in some instances, there were commissions or abbreviations suggesting the word "commissions" included in the information. Why would the word "commissions" or an abbreviations that perhaps suggests commissions be included in their notes, if you know.
>
> THE WITNESS: I don't know, but if they received the phone call from me, *it could have meant a commission paid to somebody else.* I really couldn't tell you without looking at a particular document.
>
> JUDGE WEBER: If their focus is just on the delivered cost at their expense, why do they care who you paid or what you paid if they are willing to pay your price at their front door? Why would that show up in their notes.
>
> THE WITNESS: I really couldn't tell you.

The 50c commission reference in the memorandum is consistent only with a market agency transaction in which respondents were buying for Schaake on a 50c commission basis. It is totally inconsistent with a dealer transaction.

In a dealer transaction, the dealer is selling livestock at a specified price, e.g., $65.50 per cwt. It is totally irrelevant to the buyer from a dealer what the dealer paid for the livestock, either in commissions to someone else or otherwise. There could have been no logical reason for Donaldson to have referred to commissions paid by Donaldson to someone else, in a telephone conversation with Schaake's accountant, Claude Johnson, if a dealer transaction were involved. Hence the memorandum of Donaldson's telephone conversation with Claude Johnson, set forth above, is strong and compelling evidence supporting Schaake's testimony, discussed below (§ II(A)), that his agreement with Donaldson was for Donaldson to purchase livestock for Schaake on a 50c commission basis.

Moreover, the more detailed breakdown set forth in the following subsection provides conclusive and irrefutable proof that the 50c commission referred to in the memorandum is respondents' 50c commission--not a 50c commission paid by Donaldson to someone else.

3. Memorandum of Telephone Conversation in Which Tony Seubert (Respondents' Bookkeeper) Provides "Breakdown" of the Total Invoice Price to Schaake for the 323 Steers, Showing the 50c Commission Admitted by

Donaldson as the Last Item and Showing that It Is in United States Funds, and Applicable to All 323 Head.

Mr. Schaake testified that when he got the "final settlement" on the 323 steers (i.e., respondents' invoice dated March 15, 1982 (JO Ref. 1, p. 40)), he thought the cattle were "higher than what Mike [Donaldson] and I had talked," so Mr. Schaake asked for "a breakdown of those cattle" (Tr. 223). [10] As a result, respondents' bookkeeper, Tony Seubert, called Schaake's accountant on March 29, 1982, and gave him the information which Claude Johnson recorded in a memorandum (Tr. 221-23, 281-83), a photocopy of which is included in the record as CX 44, p. 7, reproduced on the following page.

[10] Mr. Schaake was apparently recalling his own prior conversation with Donaldson, rather than Donaldson's conversation with Claude Johnson, since (as stated in the preceding subsection) the "final settlement" price of $226,571.15 (JO Ref. 18, p. 40) is 30c *less* than the price of $226,571.45 recorded by Claude Johnson (JO Ref. 26, p. 44).

<u>Shaake's Memorandum of Tony Seubert's Telephone Call</u>
<u>(CX 44, p. 7; CX 48, p. 7; CX 52, p. 7)</u>

32 → Tony Seubert called 3/29/82

33 → Break down

34 → 323 [illegible] 35 → 349,299 #

36 → Canadian money cost 24778581

37 → Frt + Feed 456352

canadians 38 → 72.24 39 → 25234733 40 ÷ → 121 41 → 208553/6

42 → Trucking 3.5681 43 → 12.44350

44 → Duty 1.09 45 → 380793

46 → Commission 47 → .50 48 → 174650

49 → 4986 50 → 22657115

The memorandum shows that Tony Seubert, respondents' bookkeeper, called on March 29, 1982 (JO Ref. 32, p. 50), and gave a "Breakdown" (JO Ref. 33, p. 50) of the 323 steers (JO Ref. 34, p. 50) weighing 349,299 pounds (JO Ref. 35, p. 50), costing a total of $226,571.15 (JO Ref. 50, p. 50). Those figures (i.e., the number, weight and cost) are identical to the figures set forth on respondents' invoice to Schaake dated March 15, 1982 (JO Ref. 14, 16, 18, p. 40).

Of vital importance to this case is the fact that the breakdown identifies the costs paid in Canadian funds, converts those funds to United States funds, and then adds the three items in United States funds, including the 50c commission. A careful examination of the data, when viewed in the light of other documentary evidence and stipulations of fact, proves conclusively and irrefutably that the 50c commission referred to in the memorandum cannot possibly refer to a commission paid by Donaldson to someone else.

Mr. Schaake explained the memorandum as follows (Tr. 223–24):

> Q. Could you just then go down the various figures on page 7 of Complainant's Exhibit 44 [11] and explain what each category is?
>
> A. Okay. Well, okay. The 323 steers [JO Ref. 34, p. 50] and the net buying weight [349,299 pounds; JO Ref. 35, p. 50], what they cost in Canadian money, total dollars in Canadian [$247,785.81; JO Ref. 36, p. 50] and then the tests and feed which was paid for in Canadian money [$4,563.52; JO Ref. 37, p. 50]. So we had a total of 252,349.33 in Canadian money [JO Ref. 39, p. 50].
>
> At that point we converted to U.S. money and the exchange rate at that time was 1.21 percent [JO Ref. 40, p. 50; i.e., dividing the total Canadian money cost, $252,349.33, by the

[11] See note 8, *supra*.

rate of exchange, 1.21, [12] converts the cost to $208,553.16 in United States funds]. So the $208,553.16 [JO Ref. 41, p. 50] would be in American funds. I don't know exactly how Mike did this, but I believe that he bought this money at the bank in Canada, bought the Canadian money, paid for the cattle with Canadian money so in Canadian dollars it cost 72.24 cents per pound with the cost of the cattle plus the testing and the feed [JO Ref. 38, p. 50; the figure of 72.24 was obtained by dividing the total Canadian money cost, $252,349.33, by the weight, 349,299 pounds].

Then Mike [Donaldson] added the trucking cost, 3.5681 cents per pound [JO Ref. 42, p. 50; or $12,463.50 (JO Ref. 43, p. 50) ($.035681 x 349,299 = $12,463.34)] and then the duty paid at the border to cross from Canada into the United States [$3,807.99; JO Ref. 45, p. 50 [13]] and then Mike's commission of 50 cents [per cwt, on the 323 head weighing 349,299 pounds, or $1,746.50 (JO Ref. 48, p. 50); $.50 x 3,492.99 = $1,746.50]. So delivered, the cattle delivered, the average was 64.86 [c per lb. (JO Ref. 49, p. 50), or a total of $226,571.15 (JO Ref. 50, p. 50)].

Although respondents cannot possibly dispute the fact that the breakdown set forth above shows a commission of *50c* per cwt in *United States funds* on the entire *323* head, this point is so vital that it is worth proving the point briefly.

[12] The 323 steers were purchased on or about March 8-12, 1982 (Findings 3-5 under the Heading "C. Transactions with Schaake Packing Company" (Initial Decision at 12-13)), and invoiced to Schaake on March 15, 1982 (JO Ref. 1, p. 40). The high, low, close and noon United States Dollar Exchange Rates were 1.21 during that entire period (except for a single low rate of 1.2097 on March 10, 1982 (CX 42, p. 10)). Actually, the rate of exchange is quoted to 4 decimal places, e.g., on March 10, 1982, which had the low rate mentioned above, the high was 1.2143, the low was 1.2097, the noon was 1.2128 and the close was 1.2110 (CX 42, p. 10). A rate, e.g., of 1.2110 means that a person giving a Canadian bank $100 in United States currency would receive $121.10 in Canadian currency. Since I have traveled in Canada each year during the last 6 years, and during many prior years, I take official notice of the fact that Canadian banks give persons who have an account with the bank, such as respondents (Tr. 789), the full exchange rate. The Stipulations filed July 23, 1985, stipulate as to the rate of exchange in effect for most of the transactions involved here (e.g., CX 41, col. 12; Stipulations at 6, ¶ 9(a)).

[13] The actual duty is 1c per pound, which is based on the invoice weight, unless the cattle are reweighed (Tr. 131, 142; see, e.g., CX 43, p. 6, showing duty of $511.15 on 51,115 pounds). In addition, as shown below, respondents pay a small brokerage fee (plus, at times, small miscellaneous fees) to the broker who handles the transaction at Customs. This accounts for respondents' figure of 1.09c per pound duty (JO Ref. 44, p. 50) rather than 1c per pound duty. The total additional "duty" amount, based on 1.09c rather than 1c, is $315, i.e., the duty at 1c is $3,492.99 ($.01 x 349,299 = $3,492.99), while the amount shown by respondent at 1.09c per pound is $3,807.99 (actually, $.0109 x 349,299 = $3,807.36,.a difference of 63c), and $3,807.99 is $315 more than $3,492.99.

As shown above, Tony Seubert's breakdown lists the Canadian money cost of the cattle ($247,785.81) and the test and feed cost ($4,563.52), resulting in total costs of $252,349.33 in Canadian funds (JO Ref. 39, p. 50). That figure is then divided by 1.21, the rate of exchange, to convert the same amount into United States funds, *viz.*, $208,553.16 (JO Ref. 41, p. 50).

Thereafter, three items are added to the $208,553.16 (United States funds) figure--trucking, duty and commission--resulting in the total cost to Schaake, $226,571.15 (JO Ref. 50, p. 50). Since that amount, $226,571.15, is the amount invoiced to Schaake (JO Ref. 18, p. 40), that amount, $226,571.15, is, of course, in United States funds. [14] Hence each of the three items added to the $208,553.16 (United States funds) figure must necessarily be in United States funds, including the 50c per cwt commission, i.e., $1,746.50 (JO Ref. 46-48, p. 50; $.50 x 3,492.99 = $1,746.50).

In addition, it is a mathematical certainty that the 50c per cwt commission is applicable to all 323 steers. The "Breakdown" shows not only the 50c commission, but also the amount of the commission, $1,746.50 (JO Ref. 48, p. 50). Multiplying the 50c per cwt commission by the entire weight of the 323 steers, 349,299 pounds (JO Ref. 35, p. 50), equals the total commission shown in the "Breakdown," $1,746.50 (JO Ref. 48, p. 50; $.50 x 3,492.99 [15] = $1,764.50).

Hence Tony Seubert's "Breakdown" of the delivered cost to Schaake of 323 steers shows (i) that the delivered cost to Schaake includes a commission of *exactly 50c per cwt*, (ii) that the 50c per cwt commission is in *United States* funds, and (iii) that the 50c per cwt commission in United States funds applies to the entire *323* head.

4. The 50c Commission in United States Funds Admitted by Respondents, Which Relates to the Entire 323 Steers, Cannot Refer to Commissions Paid by Donaldson to Others Because the Commissions He Paid to Others on the 144-Head and the 46-Head Portion of the 323 Steers Were 50c Per Cwt, 75c Per Cwt and $4 Per Head, All in Canadian Funds.

It is obvious that any cattle purchased by respondents in Canada would have been paid for in Canadian funds, including any incidental

[14] To engage in "overkill," the record shows that the invoice price of $226,571.15 was paid by Schaake in United States funds, *viz.*, by an advance of $180,000 and the remainder of $46,571.15 ($180,000 + $46,571.15 = $226,571.15), both paid by drafts drawn on the Rainier National Bank, Ellensburg, Washington (CX 44, pp. 2, 4).

[15] To convert 349,299 pounds into hundredweight, you move the decimal point two places to the left, i.e., 349,299 lbs. equals 3,492.99 cwt.

expenses incurred in Canada, such as commissions paid to others in Canada. In any event, however, respondent Donaldson admits that he paid the Canadian invoices in Canadian funds (Tr. 30–32), i.e., he testified (Tr. 30–32):

Q. During this period of time of March 9, 1982 through April 16, 1982, did Spencer Livestock Commission and Mike Donaldson keep purchase invoices showing the source of livestock purchased by you?

A. In the United States, yes.

Q. Only in the United States?

A. Yes.

Q. You did not keep any purchase invoices for Canada?

A. No.

Q. You can state as a fact that your records in Lewiston, Idaho did not contain any purchase invoices of Canadian purchases?

A. That's right.

Q. How do you know this?

A. I didn't keep any of them. I didn't buy any cattle with American money. All I did was buy Canadian money, purchased the cattle with Canadian money and brought them back into the States.

Q. Did you receive purchase invoices on Canadian purchases?

A. Yes, I did.

Q. What did you do with them once you received them?

A. After I got the cattle shipped and paid for, I threw them away.

Q. Immediately after?

A. Yes. They didn't document anything I needed for my records that I could see.

Q. Before you threw them away, did you make any other type of record which would reflect the figures which were on those purchase invoices?

A. The invoices were in Canadian currency which I was selling the cattle in American currency. They were nothing but confusing. It didn't make any difference to us what we did with them. We were getting paid for them in American funds. All we were trying to do was balance the amount of Canadian money that we purchased in Canada. We would buy the money in blocks like 500,000, 400,000 or -- you know, smaller specific amounts. Once the money was purchased and

we had that money back into our American account, we could see no reason to keep them.

Although respondent Donaldson testified that he threw away his copies of the Canadian invoices involved in this proceeding, complainant was able to obtain copies through the Alberta Department of Agriculture, The Royal Canadian Mounted Police, and by visiting some of the livestock sellers in Canada. The Canadian invoices relevant to the present discussion are reproduced below in this subsection.

The 323 head invoiced to Schaake on March 15, 1982, as to which respondents admit that the invoice price to Schaake included 50c per cwt commission in United States funds on the 323 head (see subsections 1–3, *supra*), consists of three lots, i.e., 144 head, 46 head, and 133 head (JO Ref. 2, 6, 10, p. 40). The first lot, 144 head, was purchased by respondent Donaldson in four parts, i.e., 48 head, 5 head, 46 head, [16] and 45 head. The Canadian invoices, showing the amounts respondents paid for these 144 head in Canadian funds, are reproduced on the following 4 pages (CX 42, pp. 1, 3, 4, 5).

[16] These 46 head are different from the 46-head lot listed as the second lot in the March 15, 1982, invoice (JO Ref. 6, p. 40).

Canadian Invoice for 48 Head (CX 42, p. 1)

ACCOUNTANT
JOHN LAAN
456-2941 (RES)
475-2016 (OFF)

REF
ROYAL BANK OF CANADA
FORT ROAD BRANCH

NORTHERN CATTLE CO. LTD.
LIVESTOCK ORDER BUYERS FOR
FAT AND FEEDER CATTLE
BOX 1240 EDMONTON, ALBERTA T6J 2M7

BUYER
JOHN PAULSON
PHONES: 922-4762 (RES)
403 476-2016 (OFF)
403 476-1235 (RING)

SOLD TO

Spencer Livestock
Shipped to;
Parslow & Denoon
Calgary, Alta.

DATE March 8 19 82 51

NO AND TYPE OF L/S	TOTAL WEIGHT	AMOUNT
52 48 Steers	53 47,051	54 32,831.40

RECEIVED
OCT 2 8 1982
Packers & Stockyards
PORTLAND

GROSS AMOUNT 55 32,831.40

A W 980 A W
A C 71.63 A C
A W A W
A C A C

FEED STOCKYARDS ETC		
BRANDING		
TRUCKING Peplar Ridge	56 470.51	
HARTFORD INS	57 52.32	
INOCULATION AND MED		
COMMISSION	58 352.88	
TEST SHUTE		
MISCELLANEOUS		
TOTAL EXPENSES		59 875.71
TOTAL COST		60 33,707.11

15735

ALL ACCOUNTS PAYABLE UPON
RECEIPT OF INVOICE

Canadian Invoice for 5 Head (CX 42, p. 3)

W. V. PARSLOW
TELEPHONE [illegible]

PARSLOW & DENOON LTD.

STAN DENOON
TELEPHONE [illegible]

Financial Reference
BANK OF MONTREAL
Stockyards

Phone
[illegible]

LIVE STOCK COMMISSION
ALBERTA STOCKYARDS

CALGARY, ALBERTA T2G [illegible] ____ 19__

BOUGHT for the Account of ____________

Car Nos. ____________

BOUGHT FROM	No. HEAD	DESCRIPTION	WEIGHT	PRICE	AMOUNT	
			4505		3098.47	

Feed in Yards
Branding
Testing
Trucking
Insurance
Commission
TOTAL EXPENSE

Expense

3098.47
45.97
3144.44
3144.44

Canadian Invoice for 46 Head (CX 42, p. 4)

W. V. PARSLOW
TELEPHONE 249-6908

PARSLOW & DENOON LTD.

STAN DENOON
TELEPHONE 248-8717

Financial Reference
BANK OF MONTREAL
Stockyards

LIVE STOCK COMMISSION
ALBERTA STOCKYARDS

Phone
268-4460

CALGARY, ALBERTA T2G [illegible] [illegible] 19 [illegible]

BOUGHT for the Account of [illegible] 72

Car Nos. [illegible]

65

BOUGHT FROM	No. HEAD	DESCRIPTION	WEIGHT	PRICE	AMOUNT	
	[illegible]		555	69.20	4092.64	✓
	[illegible]		[illegible] 70	69.10	[illegible]137	✓
	[illegible]		[illegible] 140	69.10	[illegible] 74	✓
73 →	46	74 →	[illegible]115			

[illegible]ed in Yards			75 → 35 76[illegible]
[illegible]anding		Expense	76 → [illegible]
Feeding	77 → [illegible]		
Trucking			35[illegible]
Insurance			78 → 44.02
Commission	79 → [illegible]	80 →	358[illegible]
TOTAL EXPENSE 82 →	[illegible] 7	81 →	[illegible]
		93 →	25930.87

SPENCER LIVESTOCK COMMISSION CO., AND MIKE DONALDSON

Canadian Invoice for 45 Head (CX 42, p. 5)

ACCOUNTANT
JOHN LAAN
456-2941 (RES)
475-2015 (OFF)

NORTHERN CATTLE CO. LTD.
LIVESTOCK ORDER BUYERS FOR
FAT AND FEEDER CATTLE
BOX 1240 EDMONTON, ALBERTA T6J 2M7

BUYER
JOHN PAULSON
PHONES: 922-4752 (RES)
403 475-2015 (OFF.)
403 476-1235 (RING)

REF
ROYAL BANK OF CANADA
FORT ROAD BRANCH

SOLD TO

Spencer Livestock
Shipped to;
Farslow & Denoon
Calgary, Alta.

DATE March 8 1982

94

NO AND TYPE OF L/S	TOTAL WEIGHT	AMOUNT
95 45 Steers	96 49,040	97 33,886.64

RECEIVED
OCT 28 1982
Packers & Stockyards
PORTLAND

98

GROSS AMOUNT 33,886.64

A W 1089 A W
A C 70.95 A C
A W A W
A C A C

FEED STOCKYARDS ETC		
BRANDING		
TRUCKING	89 490.40	
HARTFORD INS	90 49.05	
INOCULATION AND MED		
COMMISSION	91 367.80	
TEST SHUTE		
MISCELLANEOUS		
TOTAL EXPENSES		92 907.25
TOTAL COST		93 34,793.89

Lenzyel

15730

ALL ACCOUNTS PAYABLE UPON
RECEIPT OF INVOICE

The first of the four Canadian invoices reproduced immediately above dated March 8, 1982 (JO Ref. 51, p. 57), is for 48 steers (JO Ref. 52, p. 57) weighing 47,051 pounds (JO Ref. 53, p. 57) and costing $32,831.40 (JO Ref. 54, 55, p. 57). After additional expenses of $875.71 are added (JO Ref. 59, p. 57), the total cost in Canadian funds is $33,707.11 (JO Ref. 60, p. 57).

The additional expenses totaling $875.71 consist of trucking, $470.51 (JO Ref. 56, p. 57), insurance, $52.32 (JO Ref. 57, p. 57), and *commission, $352.88* (JO Ref. 58, p. 57). *The $352.88 commission, which is included in the total Canadian-funds cost of the cattle, is at the rate of 75c per cwt in Canadian funds*, i.e., $.75 x 470.51 [17] = $352.88.

The second of the four Canadian invoices reproduced immediately above dated March 9, 1982 (JO Ref. 61, p. 58), is for 5 steers (JO Ref. 62, p. 58) weighing 4,395 pounds (JO Ref. 63, p. 58) and costing $3,098.47 in Canadian funds (JO Ref. 64, 66, p. 58). After adding additional expenses totaling $45.97 (JO Ref. 67, 71, p. 58), the total cost of the cattle in Canadian funds is $3,144.44 (JO Ref. 70, p. 58).

The additional expenses totaling $45.97 consist of feed, $4 (JO Ref. 65, p. 58), testing, $20 (JO Ref. 68, p. 58), and *commission, $21.97* (JO Ref. 69, p. 58). *The $21.97 commission, which is included in the total Canadian-funds cost of the cattle, is at the rate of 50c per cwt in Canadian funds*, i.e., $.50 x 43.95 = $21.97.

The third of the four Canadian invoices reproduced immediately above dated March 9, 1982 (JO Ref. 72, p. 59), is for 46 head (JO Ref. 73, p. 59) weighing 51,115 pounds (JO Ref. 74, p. 59) and costing $35,367.30 in Canadian funds (JO Ref. p. 59). Additional expenses totaling $563.57 are then added, resulting in a total cost for the cattle of $35,930.87 in Canadian funds (JO Ref. 83, p. 59).

The $563.57 in additional expenses consists of testing, $184 (JO Ref. 77, p. 59), and *commission, $255.57* (JO Ref. 79, p. 59), for a subtotal of additional expenses of $439.57 (JO Ref. 82, p. 59). This subtotal of $439.57 is then repeated in the right-hand column of the Canadian invoice (JO Ref. 76, p. 59), and additional expenses for feed and hay, $44 (JO Ref. 78, p. 59), and more hay, $80 (JO Ref. 81, p. 59), are then added, making a total of $563.57 in additional expenses ($439.57 + $44.00 + $80.00 = $563.57). [18] *The $255.57 commission, which is included in the total Canadian-funds cost of the cattle, is at the rate of 50c per cwt in Canadian funds*, i.e., $.50 x 511.15 = $255.57.

The last Canadian invoice reproduced immediately above dated March 8, 1982 (JO Ref. 84, p. 60), is for 45 steers (JO Ref. 85, p. 60)

[17] To convert 47,051 pounds into hundredweight, you move the decimal point two places to the left, i.e., 47,051 lbs. equals 470.51 cwt.

weighing 49,040 pounds (JO Ref. 86, p. 60) and costing $33,886.64 in Canadian funds (JO Ref. 87, 88, p. 60). After additional expenses totaling $907.25 are added (JO Ref. 92, p. 60), the total cost of the cattle is $34,793.89 in Canadian funds (JO Ref. 93, p. 60).

The additional expenses totaling $907.25 consist of trucking, $490.40 (JO Ref. 89, p. 60), insurance, $49.05 (JO Ref. 90, p. 60), and *commission, $367.80* (JO Ref. 91, p. 60). *The $367.80 commission, which is included in the total Canadian-funds cost of the cattle, is at the rate of 75c per cwt in Canadian funds*, i.e., $.75 x 490.40 = $367.80.

To summarize the foregoing information relating to the 144-head portion of the 323 head invoiced to Schaake on March 15, 1982, the undisputed documentary evidence shows that *respondents paid commissions to others* of *75c* per cwt in *Canadian funds* on 48 head and 45 head, and *50c* per cwt in *Canadian funds* on 5 head and 46 head (48 + 45 + 5 + 46 = 144).

The second lot in the 323 head invoiced to Schaake on March 15, 1982, consists of 46 head (JO Ref. 6, p. 40) weighing 49,560 pounds (JO Ref. 7, p. 40). These 46 head are different from the 46 head included as part of the 144-head lot just discussed. The Canadian invoice paid by respondents in Canadian funds for these 46 head is reproduced on the following page (CX 46, p. 1).

[16] This additional expense figure of $563.57 (and another expense similarly footnoted below) is referenced because the figures are referred to in the following subsection, in which it is explained that respondents have stipulated that the information in columns 1 through 16 of CX 41, p. 1, and CX 45, p. 1, contains "all the direct and documentable expenses incidental to the purchase, transportation and importation" of the 144-head lot and the separate 46-head lot, which are part of the 323 head under discussion. An analysis of the total stipulated costs shows that the commissions referred to in this subsection at the rates of 50c and 75c per cwt and $4 per head, all in Canadian funds, are the *only* commissions respondents paid to others.

Canadian Invoice for Separate 46 Head (CX 46, p. 1)

MODERN LIVESTOCK AUCTION MART
BOX 119
CLYDE, ALBERTA T0G 0P0
PHONE 348-5893
REGULAR SALES EVERY TUESDAY – SPECIAL SALES ON REQUEST

LEE NILSSON 348 5938
BRIAN NILSSON 348 5328
BILL NILSSON 348 5328

BOUGHT FOR ACCOUNT OF

Spencer
Spencer Livestock Inc.
Box 711 Lewiston, Idaho 83501 Clyde, Alberta 94 March 9 1982

From	Cattle	Hogs	Sheep	Weight		Price	Amount		
4476 Poulsenman	10	Mix	Str	10910		69.70	7604	27	
4488 Martinson	1	Char	St	1050		69.75	732	38	
6483 Neal (13)	2	Char	St	2220	14180	69.60	1545	12	9,881.77
6494 Wilson	5	Bwf	St	3220		69.60	2633	12	
6496 "	7	Bwf	St	7040		70.25	4945	60	
6593 Stephens (21)	2	Bwf	Str	2040	28480	70.25	1433	10	19893.59
6081 Kochan	2	Mix	Str	2130		69.75	1485	68	
6273 Klaschinsky	2	Mix	St	2060		69.25	1426	55	
6286 Burbach	2	Mix	St	2070		69.25	1433	48	
6288 " (44)	11	Mix	St	12640	47380	68.90	8708	96	32948.26
6214 Matula	1	RRF	St	1080		68.25	743	92	
6215 Tomchuk (46) 95	1	Gray	St	1090 96	49560	69.25	704	83	

GROSS COST 34447 C.

AVERAGE WEIGHT	1077
AVERAGE COST	69.51

CHARGE

CAR No Chris

DOMINION GOVERNMENT LIVESTOCK ACT STATES THAT ALL ACCOUNTS MUST BE PAID WITHIN 7 DAYS AFTER PURCHASE

INTEREST AT 1% PER MONTH WILL BE CHARGED ON OVERDUE ACCOUNTS

ADDITIONS 97		
Feed		
Testing		
Branding		
98 Commission 4.00 pd	184	00
Clearing Charge		
99 Feed 9 days 1.25 p day	115	00
Injections		
Miscellaneous		
100 Vet. Fees	125	00
Yard Insurance		
101 Hanford Insurance 219	100	19
Trucking		

TOTAL EXPENSES
TOTAL COST
LESS RESALE

INVOICE NO 142649

680E

PLEASE REMIT ON RECEIPT

NET TOTAL 34971.2
102

The Canadian invoice dated March 9, 1982 (JO Ref. 94, p. 64), is for 46 head (JO Ref. 95, p. 64) weighing a total of 49,560 pounds (JO Ref. 96, p. 64) and costing \$34,447.02 in Canadian funds (JO ref. 97, p. 64). After additional expenses totaling \$524.19 are added, the total cost of the cattle in Canadian funds is \$34,971.21 (JO Ref. 102, p. 64).

The \$524.19 consists of a *commission of \$4 per head, totaling \$184 in Canadian funds* (JO Ref. 98, p. 64; \$4.00 x 46 = \$184.00), feed, \$115 (JO Ref. 99, p. 64), veterinarian fees, \$125 (JO Ref. 100, p. 64), and insurance, \$100.19 (JO Ref. 101, p. 64) (\$184.00 + \$115.00 + \$125.00 + \$100.19 = \$524.19).[19]

As shown above, the *commissions paid by respondents to others* on the 144-head portion of the 323 head invoiced to Schaake on March 15, 1982, were at the rate of *75c* per cwt in *Canadian funds* and at the rate of 50c per cwt in *Canadian funds.* The *commission paid by respondents to someone else* on the separate 46-head portion of the 323 steers invoiced to Schaake on March 15, 1982, was at the rate of *\$4 per head* in *Canadian funds*.

The record does not contain the documentary evidence showing the commissions paid by respondents to others in connection with the 133-head portion of the 323 steers under discussion (JO Ref. 10, p. 40), because respondents' attorney requested the Canadian firm not to make the records available to complainant (Tr. 168-73). But since the documentary evidence relating to the 144-head portion and the separate 46-head portion of the 323 steers shows conclusively that the commissions respondents paid to others on those portions of the 323 steers were not at the rate of *50c* per cwt in *United States funds*, but, rather, were all in *Canadian funds*, and were at rates of 50c per cwt, 75c per cwt, and \$4 per head, the 50c per cwt commission in United States funds applicable to the entire 323 head, referred to by Donaldson and Seubert in their conversations with Schaake's accountant, Claude Johnson, could not possibly refer to commissions paid by Donaldson to others.

The foregoing analysis proves conclusively and irrefutably to anyone familiar with livestock marketing that the 50c per cwt commission in United States funds applicable to the entire 323 head, referred to by Donaldson and Seubert in their conversations with Schaake's accountant, could only refer to respondents' commission--not to commissions paid by Donaldson to others.

[19] This figure of \$524.19 is referred to in the following subsection (see note 18, *supra*).

However, to someone totally unfamiliar with livestock marketing (and the expenses that would be incurred in connection with moving livestock, e.g., from Canada to a feedlot in the United States), the *theoretical* argument could be made that even though the commissions paid by respondents to others on the 144-head portion and the 46-head portion of the 323 steers, at the rates of 50c per cwt, 75c per cwt, and $4 per head, all in Canadian funds, are included in the Canadian money cost of the cattle, $247,785.81 (JO Ref. 36, p. 50), and, therefore, are included in the total amount of Canadian expenses of $252,349.33 (JO Ref. 39, p. 50), and are similarly included in the quotient of that amount ($208,553.16) after it is divided by 1.21 (JO Ref. 40, p. 50) to convert it into $208,553.16 in United States funds (JO Ref. 41, p. 50), nonetheless, Donaldson paid an additional commission of 50c per cwt in United States funds on the entire 323 steers weighing 349,299 pounds, for a total of $1,746.50 ($.50 x 3,492.99 = $1,746.50), to another person or persons.

As indicated above, that theoretical argument could not be made to anyone familiar with livestock marketing. After the 323 head of cattle have been purchased in Canada, and all commissions have been paid in Canadian funds to the persons in Canada incident to the purchase of the cattle in Canada, and the testing and feed charges have been paid in Canada, there is no other person or persons who could possibly be paid a 50c per cwt commission in United States funds on the 323 head.[20] As Mr. Schaake testified, "[w]ithin the States, the only expense you have on the cattle besides the cost of the cattle themselves is the freight" (Tr. 248) and duty (Tr. 224). Duty is not paid on a commission basis (note 13, *supra*), and respondents' purported expert, Mr. Frye, admitted that freight is not paid on a commission basis (Tr. 598-99).

In any event, however, stipulations of fact and other undisputed documentary evidence account for "all the direct and documentable expenses incidental to the purchase, transportation and importation" of the 144-head portion and the 46-head portion of the 323 steers (Stipulations filed July 23, 1985, at 6-8). The stipulated *total* expenses can all be accounted for without leaving any possibility that respondents paid a 50c per cwt commission in United States funds on the 323 head (totaling $1,746.50) to someone else (see subsection 5, immediately following).

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[20] The Customs broker receives a small brokerage fee in United States funds, but that small fee is included in the "duty" amount which respondents included at 1.09c per pound (JO Ref. 44, p. 50) (see note 13, *supra*).

5. The Parties Have Stipulated as to the Total Expenses of Respondents Incident to the 144-Head and 46-Head Portion of the 323 Steers. The Stipulations and Undisputed Documentary Evidence Do Not Leave Any Possibility for Respondents to Have Paid a Commission of 50¢ Per Cwt in United States Funds to Someone Else on the Steers.

The parties have stipulated to "all the direct and documentable expenses incidental to the purchase, transportation and importation" of the 144-head portion and the 46-head portion of the 323 steers, as follows (Stipulations filed July 23, 1985, at 6-8; emphasis supplied):

> 9. (a) *On or about March 8 and 9, 1982, respondents purchased 144 head of livestock and shipped these livestock to Schaake Packing Co. The information contained in columns one through sixteen of CX 41 [which consists of only one page] shows the cost of these livestock and all the direct and documentable expenses incidental to the purchase, transportation and importation of these livestock.* The information in columns twenty through twenty-two shows the amount billed and collected by respondents for the livestock.
>
> (b) The documents contained on pages one through six of CX 42 are accurate copies of the original invoices showing the purchase and expense amounts for the 144 head of livestock referred to in Stipulation No. 9(a) above.
>
> (c) The documents contained on pages two through nine of CX 43 are accurate copies of original broker's invoice, consumption entry certificates, customs invoices and check in payment of broker's fees and duty relating to the importation of the livestock referred to in Stipulation No. 9(a) above.
>
> (d) The documents contained on pages one through five of CX 44 are accurate copies of the original invoices and drafts showing the amount billed to and the amount paid by Schaake Packing Co. for the livestock referred to in Stipulation No. 9(a) above.
>
> 10. (a) *On or about March 9, 1982, respondents purchased 46 head of livestock and shipped these livestock to Schaake Packing Co. The information contained in columns one through sixteen of CX 45 [which consists of only one page] shows the cost of these livestock and all the direct and documentable expenses incidental to the purchase, transportation and importation of these livestock.* The information in columns twenty through twenty-two shows the amount billed and collected by respondents for the livestock.
>
> (b) The documents contained on pages one and two of CX 46 are accurate copies of the original invoice and receivables ledger showing the purchase and expense amounts for the 46 head of livestock referred to in Stipulation No. 10(a) above.

(c) The documents contained on pages two through six of CX 47 are accurate copies of the original broker's invoice, consumption entry certificate, customs invoice, scale ticket and check in payment of broker's fees and duty relating to the importation of the livestock referred to in Stipulation No. 10(a) above.

(d) The documents contained on pages one through five of CX 48 are accurate copies of the original invoices and drafts showing the amount billed to and the amount paid by Schaake Packing Co. for the livestock referred to in Stipulation 10(a) above.

The stipulated total expenses of respondents incident to the 144-head portion and the 46-head portion of the 323 steers are set forth on the following table, which contains all of the expenses and costs contained in columns 1 through 16 of CX 41 and CX 45, referred to in the stipulations, plus columns 17 and 18, which show the total cost of the cattle including Donaldson's commission of 50c per cwt.

Insert Table Referred To In Previous Paragraph (Orig. Pg. 70)

STIPULATED TOTAL EXPENSES OF RESPONDENTS INCIDENT TO 144 HEAD AND 46 HEAD (CX 41, 45)

Col. 2 No. Hd.	Col. 4 Weight	Col. 5 Invoice Amt for Cattle	Col. 6 Invoice Amt for Expenses	Col. 8 Sub-Total	Col. 10 Freight Expense US or Can	Col. 11 Total Amt Canadian	Col. 12 Conversion to U.S. Dollars Rate = 1.21	Col. 15 Duty	Col. 16 Other Fees & Overtime	RESPONDENTS' 50¢/CWT COMMISSION AND TOTAL COST: Col. 17 Donaldson's Commission 50¢/cwt	Col. 18 Total Cost of Cattle
48	47,051	$33,707.11	$448.00	$34,155.11	U.S.			$514.65	$61.33	$257.23	
5	4,395	3,098.47	45.97	3,144.44							
53	51,446	$36,805.58	$493.97	$37,299.55	$1,414.50	$37,299.55		511.15	61.33	255.57	
46	51,115	35,367.30	563.57	35,930.87	1,414.50	35,930.87		490.40	61.33	245.20	96,318.89
45	49,040	34,793.89	412.50	35,206.39	1,414.50	35,206.39	89,617.20	1,516.20	183.99	758.00	
					4,243.50	108,436.81	4,243.50				
							93,860.70				
144	151,601										
46	49,560	34,447.02	524.19	34,971.21	Can. 2,020.00	36,991.21	30,571.25	491.80	123.16	247.80	

The columns from column 1 through column 16 of CX 41 and CX 45 (referred to in the stipulations) that have been omitted from the foregoing table contain no cost data. The omitted columns give the following information: column 1 shows the date, column 3 shows the sex, column 7 shows additional feed costs, if any (but none were included in column 7 of CX 41 or CX 45), column 9 shows the name of the trucker, column 13 is left blank, and column 14 shows the name of the Customs broker. Accordingly, pursuant to the stipulations, the foregoing table contains *all* of respondents' direct and documentable expenses involved in the 144-head portion and 46-head portion of the 323 steers invoiced to Schaake on March 15, 1982.

A careful analysis of the data, together with the undisputed, supporting documentary evidence, shows that the commissions paid by respondents to others on the 144 head (comprised of 48 head, 5 head, 46 head, and 45 head) and the separate 46 head are included in column 5 "Invoice Amount for Cattle" or column 6 "Invoice Amount for Expenses," prior to their conversion into United States funds in column 12.

First, as to the 48 head included in the 144-head lot, the commission of $352.88 paid by respondents to someone else (JO Ref. 58, p. 57) at the rate of 75c per cwt in Canadian funds is included in the $33,707.11 shown in column 5 (Invoice Amount for Cattle) (JO Ref. 60, p. 57).

Second, as to the 5 head included in the 144-head lot, the commission of $21.97 paid by respondents to someone else (JO Ref. 69, p. 58) at the rate of 50c per cwt in Canadian funds is included in the $45.97 shown in column 6 (Invoice Amount for Expenses) (JO Ref. 67, 71, p. 58).

Third, as to the 46 head included in the 144-head lot, the commission of $255.57 (JO Ref. 79, p. 59) paid by respondents to someone else at the rate of 50c per cwt in Canadian funds is included in the $563.57 shown in column 6 (Invoice Amount for Expenses) (see note 18, *supra*, and accompanying text).

Fourth, as to the 45 head included in the 144-head lot, the commission of $367.80 (JO Ref. 91, p. 60) paid by respondents to someone else at the rate of 75c per cwt in Canadian funds is included in the $34,793.89 shown in column 5 (Invoice Amount for Cattle) (JO Ref. 93, p. 60).

Finally, as to the separate 46 head shown at the bottom of the table, the commission of $184 paid by respondents to someone else (JO Ref. 98, p. 64) at the rate of $4 per head in Canadian funds is included in the $524.19 shown in column 6 (Invoice Amount for Expenses) (see note 19, *supra*, and accompanying text).

Hence all of the commissions paid by respondents to someone else incident to the purchase of the 144-head portion and the separate

46-head portion of the 323 steers are included in the Canadian-funds cost of the cattle and Canadian-funds expenses. Accordingly, the 50c per cwt commission in United States funds relating to the entire 323 head (totaling $1,746.50 in United States funds), admitted by respondents in their conversations with Schaake's accountant, cannot possibly refer to the documented commissions paid by respondents to others in Canadian funds referred to above.

Furthermore, as shown immediately below, that portion of respondents' total costs and expenses incident to the 144-head lot and the separate 46-head lot that were in United States funds can all be accounted for without leaving any room for including a 50c per cwt commission in United States funds, totaling $1,746.50, paid by respondents to others.

The only items in columns 2 through 16 of the table, which set forth respondents' stipulated, total expenses, that were paid for in United States funds are (i) the freight expense (column 10) for the 144 head,[21] (ii) the duty for the 144 head and the separate 46 head (column 15), and (iii) other fees and overtime for the 144 head and the separate 46 head (column 16).[22]

First, as to the freight expense (for the 144 head only), since the trucking expense is listed separately from the 50c commission in Tony Seubert's breakdown (JO Ref. 42, 46, p. 50), the 50c commission is obviously not included in column 10 (Freight Expense). Moreover, the total trucking expense listed in column 10 in United States funds is

[21] The $4,243.50 freight charge for the 144 head was invoiced by Nello Pistoresi and Son, Inc., in United States dollars (CX 42, p. 7) and was paid by respondents in United States dollars by a check drawn on respondent Spencer's Lewiston, Idaho, checking account (CX 42, p. 8). Accordingly, the $4,243.50 freight expense for the 144 head is not included in column 11 of the table (Total Amount Canadian), but is added in column 12 (Conversion to U.S. Dollars) after the Canadian expenses for the 144 head have been converted to United States dollars. However, the freight expense for the separate 46 head at the bottom of column 10 is in Canadian funds (CX 45, *col. 10*), and, therefore, the $2,020 freight expense for the separate 46 head is included in column 11 of the table (Total Amount Canadian). (Theoretically, respondents could have paid Canadian expenses invoiced in Canadian dollars *with a United States* check, in which case they would have been given credit for all or most of the rate of exchange. But the record here shows that respondents *paid the Canadian* expenses with Canadian money (Tr. 30-32, 789)).

[22] Column 12 is, of course, in United States funds, but that column merely represents the United States Dollar equivalent of the Canadian-funds expenses.

$4,243.50 (for the 144 head), and that is the exact amount billed by the trucking company for transporting the 144 head (CX 42, p. 7). Hence, column 10 (Freight Expense, US or Can) cannot possibly include all or any part of the $1,746.50 commission in United States funds respondents contend was paid to someone else.

Second, as to the duty for the 144 head and the separate 46 head, since the duty set forth in Tony Seubert's breakdown at 1.09c per pound (which includes the 1c per pound actual duty and a small amount for incidental expenses (see note 13, *supra*)) is listed separately in Tony Seubert's breakdown from the 50c commission (JO Ref. 44, 46, p. 50), the 50c commission is obviously not included in column 15 of the table (Duty).

Moreover, the duty figures in column 15 cannot possibly include all or any part of a 50c commission totaling $1,746.50 because column 15 lists only the exact amount of the duty at the rate of 1c per pound, which is the applicable rate (Tr. 131, 142). For example, the duty in column 15 on the 45-head portion of the 144-head lot weighing 49,040 pounds is $490.40 ($.01 x 49,040 = $490.40). The duty in column 15 on the 48 head and 5 head combined, totaling 51,446 pounds, is $514.65. (The record does not show why there is a 19-pound discrepancy in the weight of these animals between the purchase invoices and the Customs document, resulting in 19c "extra" duty.) The duty in column 15 on the 46 head (included within the 144-head lot) weighing 51,115 pounds is $511.15. The duty in column 15 on the separate 46-head lot (at the bottom of the table) weighing 49,560 pounds (column 4) is $491.80 because the animals were reweighed at 49,180 pounds (CX 47, pp. 4-6).

Hence the duty figures in column 15 of the table include only the actual duty of 1c per pound paid by respondents on the 144-head lot and the separate 46-head lot. Accordingly, no part of a 50c commission totaling $1,746.50 in United States funds allegedly paid by respondents to others is included in column 15 of the table.

Finally, as to column 16, the last of the columns included in the stipulations as to respondents' total costs that relates to costs or expenses in United States funds, an analysis of the undisputed documentary evidence shows that column 16 (Other Fees and Overtime) includes only the brokerage fee charged by the Customs broker and veterinarian overtime.

As to the three $61.33 fees shown in column 16 for the 144 head, CX 43, pp. 1-3, show the brokerage fee and veterinarian-overtime fee paid by respondents to Norman Jensen, Inc., the Customs broker that handled the 144 head. Specifically, CX 43, pp. 1, 2, show the actual Customs brokerage fees of $43.25, $41.25, and $43.25, respectively, for the 46 head, the 45 head, and the 53 head (i.e., the 48 head and 5 head combined), included in the 144-head lot, for a total of $127.75

in brokerage fees. To this was added the veterinarian-overtime fee of \$54.24 (CX 43, p. 1, note 1) [23] for a total of \$181.99 (\$127.75 + \$54.24 = \$181.99). The overtime fee was prorated to the entire 144 head, and the brokerage fees and veterinarian-overtime fee for the 144 head were shown in column 16 as three uniform fees of \$61.33. [24]

Similarly, CX 47, pp. 1-4, show that respondents' expense of \$123.16 shown in column 16 at the bottom of the table for the separate 46-head lot includes veterinarian overtime of \$68.16, and consumption entry charges of \$55 (i.e., brokerage fee), for a total of \$123.16.

Accordingly, column 16 (Other Fees and Overtime) cannot possibly relate to the 50c commission totaling \$1,746.50 in United States funds referred to in Tony Seubert's breakdown. In addition, the small portion of column 16 relating to Customs brokerage fees, \$182.75 (\$127.75 + \$55 = \$182.75), is included in Tony Seubert's breakdown as part of the 1.09c per pound "duty" (JO Ref. 44, p. 50) (see note 13, *supra*).

Moreover, the total expenses set forth in column 16 (Other Fees and Overtime) for the 144 head and the separate 46 head are only \$307.15 (\$183.99 + \$123.16 = \$307.15), which is much too small to relate to the 50c per cwt commission, which totals \$1,746.50 on the 323 head. [25]

Hence, the undisputed documentary evidence shows that columns 2 through 16 of the table (which include "all" respondents expenses incident to the 144 head and the separate 46 head) do not include a 50c per cwt commission paid by respondents to other persons in United States funds.

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[23] An asterisk above note 1 of CX 43, p. 1, states that some paperwork shows the veterinarian-overtime fee as \$59.45, but it was included as \$54.24 in complainant's schedule (CX 43, p. 1) obviously because Jensen's invoice to respondents shows as the last item in the center of the invoice "VET OVER TIME CHARGE," and the charge which is shown opposite in the far right-hand column is "54.24" (Cx 43, p. 2).

[24] Complainant's investigator made a \$2 error. The three brokerage fees and the \$54.24 overtime fee total \$181.99. The investigator erroneously divided \$183.99 by 3 to arrive at \$61.33, which he prorated among the three lots (the 48 head and 5 head were combined by the Customs broker; Manifest # 5943, CX 43, p. 2).

[25] The total weight of the 144 head (151,601 pounds) and the separate 46 head (49,560 pounds) is 201,161 pounds (or 2,011.61 cwt). The commission on that total weight at 50c per cwt (as shown by Tony Seubert's breakdown) would be \$1,005.81 (\$.50 x 2,011.61 = \$1,005.81). (The commission at 50c per cwt on the remaining 133 head included in the 323 head under discussion would be \$740.69, i.e., \$.50 x 1,481.38 (JO Ref. 11, p. 40) = \$740.69; \$740.69 + \$1,005.81 = \$1,746.50, the amount shown in Tony Seubert's breakdown for the 323 head (JO Ref. 48, p. 50)).

Respondent's have stipulated that the expenses set forth above (i.e., in columns 2–16) are "all" the direct and documentable expenses incident to the purchase, transportation and importation of the 144-head lot and the separate 46-head lot included in the 323 steers invoiced to Schaake on March 15, 1982. "All" means "the whole number, quantity, or amount: TOTALITY" (*Webster's Third New International Dictionary, Unabridged* (1981), at 54). And *see Black's Law Dictionary* (5th ed. 1979), at 68. "The word 'all' signifies 'the whole of'; . . . A more comprehensive word cannot be found in the English language." *Vandermode* v. *Appert*, 125 N.J. Eq. 366, 5 A.2d 868, 871 (1939). And *see Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 610–11 (1944). "A more comprehensive and all-inclusive word than 'all' can hardly be found in the English language. There is a totality about it that few words possess." *In re Central of Georgia Ry. Co.*, 58 F. Supp. 807, 813 (S.D. Ga.), *rev'd on other grounds*, 150 F.2d 453, 455–56 (5th Cir. 1945).

In view of the stipulations referred to above, respondents are not free to argue that, in addition to the expenses set forth above, they incurred additional expenses of $1,746.50 in the form of a commission paid to other persons at the rate of 50c per cwt in United States funds, that are not included in the foregoing figures relating to the 144 head and the separate 46 head. Accordingly, the $1,746.50 referred to in Tony Seubert's breakdown (JO Ref. 48, p. 50), which represents a commission of 50c per cwt in United States funds (JO Ref. 46, p. 50) applicable to the entire 323 steers weighing 349,299 pounds (JO Ref. 35, p. 50), necessarily represents respondents' commission of 50c per cwt on the 144 head and the 46 head.

The analysis set forth above (§ I (B) (1)–(5)) proves irrefutably and mathematically that respondents' invoice price to Schaake on the 144-head and 46-head portions of the 323-head lot included respondents' 50¢ per cwt commission. The telephone memoanda are "smoking guns," proving conclusively that the steers were purchased by respondents on a 50¢ per cwt commission basis.

Although the foregoing analysis was presented to respondents in the form of a tentative draft, respondents do not challenge the accuracy of the mathematical analysis but, rather, argue that "mathematical computations cannot conclusively prove non-mathematical facts," and that here "the ultimate issue of fact is not a mathematical fact" (Brief filed Feb. 9, 1987, at 13). Respondents argue that the telephone memoranda "are not consistent with all the other facts which point toward a dealer relationship" (Brief at 14), and that "the only number appearing on the memoranda which was important to Mr. Schaake was his cost per hundred weight" (Brief at 15). Respondents conclude (Brief at 18):

> The foregoing discussion suggests that the telephone memoranda are not "smoking guns". Rather, the telephone memoranda contain notations thought by the parties to be unimportant at the time. They are more in the nature of quirks.

However, the very fact that "the telephone memoranda contain notations thought by the parties to be unimportant at the time" is what makes the memoranda such damning evidence here! Neither Mr. Schaake nor respondents expected, when the memoranda were made, that complainant would go to Canada and uncover fraudulent activities by respondents. Hence the ingenuous memoranda, made and kept in the normal course of business, have inherent integrity.

The memoranda record (i) respondent Donaldson's admission that the delivered cost includes duty and *50c per cwt commission* (JO Ref. 31, p. 44), and (ii) respondents' breakdown showing that the 50c per cwt commission is in United States funds and applicable to the entire 323-head lot (§ I(B)(3), *supra*), *which could only be respondents' commission* (§ I(B)(4)-(5), *supra*).

In short, the telephone memoranda are "smoking guns" that would, by themselves, compel a finding that the 144 head and 46 head were purchased by respondents on a 50c per cwt commission basis, irrespective of any other evidence in this case.

C. The Foregoing Discussion Compels the Inference that the 50c Per Cwt Commission in United States Funds Admitted by Respondents Was Not a Commission Paid to Someone Else with Respect to the Remaining 133-Head Portion of the 323 Head. Moreover, It Can Be Shown with Mathematical Certainty that the 133 Head Were Not Invoiced to Schaake at a Dealer's Price to Be Multiplied by the Weight to Arrive at the Invoice Amount.

1. Inference as to the Remaining 133 Head Compelled by Foregoing Discussion.

As shown above, the stipulations and undisputed documentary evidence show irrefutably and with mathematical certainty that the 50c per cwt commission in United States funds applicable to the entire 323 head, admitted by respondents, was respondents' 50c commission, rather than a commission paid by respondents to others, on the 144-head and 46-head portions of the 323 head invoiced to Schaake on March 15, 1982.

Although it would be preposterous for respondents to argue, nonetheless, that with respect to the third portion of the 323 head, involving 133 steers (JO Ref. 10, p. 40), the 50c commission was an entirely different kind of commission, *viz.*, a commission paid by respondents to someone else on the 133 head, that argument is *theoretically* available to respondents. That is, with respect to the 133-head portion of

the 323 head invoiced to Schaake on March 15, 1982, we do not have stipulations of fact relating to respondents' total expenses, and we do not have the Canadian invoices showing the commissions actually paid by respondents to someone else. However, the documentary evidence, stipulations and discussion set forth above as to the 144 head and the 46 head compel the inference that the 50c commission admitted by respondents is also respondents' commission on the 133 head, rather than a commission paid by respondents to others.

First, the 50c per cwt commission in United States funds admitted by respondents is set forth in the memoranda of both conversations as a single item applicable to all 323 head (JO Ref. 31, p. 44; JO Ref. 46–48, p. 50). If the 50c per cwt commission represented two entirely different kinds of commissions, *viz.*, (i) respondents' 50c per cwt commission as to the 144 head and the separate 46 head, and (ii) a 50c per cwt commission paid by respondents to someone else as to the 133 head, respondents would have made that fact known, and it would have been recorded in the memoranda.

Second, since the undisputed documentary evidence as to other transactions involved in this case shows that *all* of the commissions paid by respondents to others were included in the Canadian invoices, [26] which respondents admit were paid in Canadian funds (Tr. 30–32), it would defy logic for respondents to have paid a commission of 50c per cwt *in United States funds* to someone else on these 133 head. Moreover, as shown in subsection 4, *supra*, p. 67, there is no one in the United States who could have been paid a commission of 50c per cwt (Tr. 248, 596–99).

Third, if the 133 head were sold to Schaake on a dealer basis, it is inconceivable that respondent Donaldson would have referred to a 50c commission, or that Tony Seubert would have given Schaake's accountant a detailed breakdown showing all of the costs and expenses in connection with the 323 head, including the 133 head under discussion. As stated in subsection I(B)(2) above, in a dealer transaction, the buyer needs to know only the weight and the price. What the dealer paid for the livestock, or what expenses the dealer incurred in

[26] As shown above, the commissions paid by respondents to others on the 144 head and the separate 46 head were in Canadian funds. Similarly, the commissions paid by respondents to others in the other transactions involved in this proceeding as to which the record contains documentary evidence of respondents' expenses were all included in Canadian invoices, which respondents admit were paid in Canadian funds (Tr. 30-32, 789). See, e.g., CX 9, pp. 1–4; CX 17, p. 1; CX 21, pp. 1–2; CX 26, pp. 3–8; CX 30, pp. 4-12, 14; CX 34, p. 1; CX 38, pp. 1–2; CX 54, p. 1; CX 58, p. 1; CX 62, pp. 1–2; CX 66, pp. 1–2. (All of the exhibits cited in this note except for the last are invoices from Parslow & Denoon Ltd., the same commission firm involved in three of the lots referred to in the preceding subsections.)

the way of commissions or otherwise, is totally irrelevant. It is inconceivable that respondent Donaldson would have said that the delivered price included duty and 50c commission, or that Tony Seubert would have provided the detailed breakdown referred to above, if a dealer transaction were involved.

Fourth, the fact that the 50c per cwt commission is listed *last* in Tony Seubert's breakdown (JO Ref. 46-48, p. 50), after all the other Canadian and United States items have been listed, is a circumstance indicating that the 50c per cwt commission is respondents' commission. If it were a commission paid to someone else, it logically would have been listed earlier in the breakdown. (In fact, the only logical commission paid by respondents to someone else in such a transaction would be a commission paid in Canadian funds to the Canadian commission firm buying the 133 head at respondents' request, which would be included in the Canadian money cost of the cattle (JO Ref. 36, p. 50)).

For the foregoing reasons, together with others referred to by the ALJ and others discussed below, I infer that the 50c per cwt commission in United States funds applicable to the entire 323 head, admitted by respondents, refers to respondents' commission of 50c per cwt with respect to the 133-head portion of the 323 head.

2 <u>It Can be Shown with Mathematical Certainty that the 133 Head Were Not Invoiced to Schaake at a Dealer's Price Multiplied by the Weight to Arrive at the Invoice Amount.</u>

Respondents contend that the 133-head lot (JO Ref. 10, p. 40) shown on respondents' invoice to Schaake dated March 15, 1982 (JO Ref 1, p. 40), is a dealer transaction in which respondents were selling 133 steers with a "WEIGHT" of 148,138 pounds (JO Ref. 11, p. 40) at a "PRICE" of $65.75 per cwt (JO Ref. 12, p. 40), resulting in a total "AMOUNT" invoiced to Schaake for the 133 head of $97,401.95 (JO Ref. 13, p. 40). *If this were a dealer transaction, when you multiply the "WEIGHT," 148,138 pounds (or 1,481.38 cwt), by the "PRICE,"* $65.75 per cwt, *it would equal the invoice "AMOUNT,"* "$97,401.95." *It does not!!!!*

The product (result) of the "WEIGHT" times the "PRICE" is $97,400.74 (1,481.38 x $65.75 = $97,400.74), a difference of $1.21 from the "AMOUNT" shown on respondents' invoice ($97,401.95 - $97,400.74 = $1.21). If this were the only discrepancy, we could attribute it to a mathematical error. But it is not the only discrepancy! In fact, *none* of the figures on the invoice under the heading "AMOUNT" were obtained by multiplying the figures under the heading "WEIGHT" by the figures under the heading "PRICE."

The actual products (results) obtained by multiplying each "WEIGHT" by the "PRICE" shown on the invoice, and the difference in each case between the actual product (result) and the "AMOUNT"

shown on respondents' invoice are set forth on the following page, which reproduces the invoice as previously reproduced on page 40, but off-center so that two additional columns can be added at the right, showing the actual product (result) of the "WEIGHT" times the "PRICE," and the difference between the actual amount and the "AMOUNT" as shown on respondents' invoice.

Respondents' Invoice to Schaake for 323 Head (X 44, p. 1; CX 48, p. 1; CX 52, p. 1)

INVOICE
MIKE DONALDSON
SPENCER LI\ TOCK COMMISSION COMPANY
P O Box 1222
Lewiston, Idaho 83501

DATE 3-15-[illegible]

To Schaak. Rch
Box 128
Ellensburg WA 98926

NO. HEAD	KIND	AVE. WT		WEIGHT	PRICE	AMOUNT	Actual Amount of Weight Times Price	Difference
144	strs	1052		151601	64 14	97242 97	$ 97,236.88	$ 6.09
46	strs	1077		49560	64 41	31926 23	31,921.60	4.63
133	strs	1113		148138	65 75	97401 95	97,400.74	1.21
323		(1081)		349299	64 86	226571.15	226,555.33	15.82
				Down	Pymt <	180,000 >		
						46,571.15		

TOTAL

It is quite easy to determine how respondents arrived at the figures under the heading "PRICE." Simply divide the "AMOUNT" shown on respondents' invoice by the "WEIGHT" shown on the invoice, and the quotient (result) is the figure shown on the invoice under the heading "PRICE." For example, with respect to the 133 head, the "AMOUNT," $97,401.95 (JO Ref. 13, pp. 40, 82), divided by the "WEIGHT," 148,138 pounds (or 1,481.38 cwt) (JO Ref. 11, pp. 40, 82), equals $65.75, the "PRICE" shown on respondents' invoice (JO Ref. 12, pp. 40, 82). The cost divided by the weight is, of course, the *average cost* per cwt.

Conversely, when you multiply the "WEIGHT" by the *average cost*, $65.75, i.e., the figure shown by respondents as the "PRICE," you do not get the "AMOUNT" shown on the invoice because the average cost figures listed under the heading "PRICE" were not carried out to 5 decimal places. That is, the *exact* average cost of the 133 head is $65.75082 per cwt ($97,401.95 - 1,481.38 = $65.75082). If the "WEIGHT" is multiplied by that *exact* average cost, the product (result) is the same as the "AMOUNT" shown on the invoice (1,481.38 x $65.75082 = $97,401.949, which rounds to $97,401.95).

Accordingly, the "PRICE" figures shown on respondents' invoice are not really the price per cwt, but, rather, are the average cost per cwt of the steers. This can be proven not only mathematically (i.e., by (i) multiplying each "WEIGHT" by its corresponding "PRICE," and observing that the product (result) is not the "AMOUNT" shown on the invoice, and then (ii) dividing each "AMOUNT" by its corresponding "WEIGHT," and observing that the quotient (result) is the "PRICE" shown on the invoice), but, also, by other documentary evidence in connection with other transactions, in which respondents' breakdowns of the invoice prices show clearly that the figures under the heading "PRICE" are really average cost figures (including a 50c per cwt commission), rather than true price figures (see § II(B)(2), *infra*). (In addition, as shown in § IV below, respondents' invoice price to Schaake of $65.76 per cwt for 73 head is also an average cost figure, rather than a true "price" figure.)

To tie this analysis into Schaake's memoranda discussed above, the average cost of the 323 head, $64.86 per cwt, which is shown on respondents' invoice to Schaake under the heading "PRICE" (JO Ref. 17, pp. 40, 82), was determined by dividing the total "AMOUNT" for the 323 head, $226,571.15 (JO Ref. 18, pp. 40, 82), by the total "WEIGHT," 349,299 pounds (or 3,492.99 cwt) (JO Ref. 16, pp. 40, 82). (But if you multiply the "WEIGHT," 349,299 pounds (3,492.99 cwt), by the "PRICE," $64.86, you do not get the "AMOUNT" shown on the invoice, which proves that $64.86 is the average cost, rather than the price, of the 323 head.) This average cost figure, $64.86, is

the same average cost figure shown on Schaake's memorandum of Donaldson's telephone call (JO Ref. 27, p. 44), and Schaake's memorandum of Tony Seubert's telephone call (JO Ref. 49, p. 50).

The fact that the figures under the heading "PRICE" on respondents' invoice to Schaake are not really the price that was charged per cwt on each lot completely destroys respondents' argument that they were acting as a dealer and selling animals at whatever price they chose to sell them. The "PRICE" figure shown on the invoice is not even a price at all--rather, it is merely the average cost of the animals.

"Dealers follow two methods of buying and selling livestock. Some transactions are made on a per head basis, while other transactions are on a weight basis." Fowler, *The Marketing of Livestock and Meat* 311 (1961). Where a dealer is selling feeder livestock by weight, rather than by the head, somewhere on the invoice the dealer must show the price per pound or per cwt. Otherwise, there is no way to determine from the invoice whether the amount has been correctly computed. Respondents' failure to show an actual price per cwt on their invoice shows quite clearly that they were not selling as a dealer (at a set price agreed to by the parties).

Respondents' purported expert witness, John Frye, a Certified Public Accountant with a large livestock industry practice, admitted that in a normal dealer transaction, livestock is priced at a certain price per hundredweight, e.g., $62.50 per cwt. He testified (Tr. 672-73):

> Q.But isn't it true that in a dealer transaction the costs aren't passed along per se, that the cattle are just priced out at a delivered cost?
>
> A.I'm sorry. Would you ask again, please?
>
> Q. In a dealer transaction, aren't the cattle just priced at a price per hundredweight?
>
> A. In a dealer transaction?
>
> Q. Yes.
>
> A. In most cases that's usually the truth, yes.
>
> Q. That if I am going to sell to you, if I am a speculator, or since -- you have correctly defined dealer. Let me use that term. Say I am a dealer and I'm going to sell to you and I get in touch with you and say, "Mr. Frye, I propose and I will sell you 100 head of livestock," and I tell you the type and I tell you all the circumstances, and I am going to price them to you at $62.50 per hundredweight, wouldn't that be the way a normal dealer transaction occurs?
>
> A. Yes, sir.

Respondents' failure to show any true "price" on their invoice is a highly significant circumstance supporting Mr. Schaake's testimony that these were commission transactions.

Lest someone should misconstrue the point of this discussion, the figures under the column "Difference" on the off-centered invoice set forth above, *supra*, p. 82, are not the amounts by which respondents cheated Schaake. For example, the "Difference" figure for the first (144-head) lot shown on the off-centered invoice reproduced above is only $6.09, but if (as the ALJ and I have found) these 144 head were sold to Schaake on a 50c per cwt commission basis, respondents cheated Schaake out of $924.08 on these 144 head (by falsely "inflating" the costs) (CX 41, p. 1, column 23; Stipulations filed July 23, 1985, at 6, ¶ 9(a)). The only purpose of this discussion is to show that there is no true price shown on the invoice; i.e., the figures under the heading "PRICE" are actually the average cost.

It is not unusual for an invoice to show not only the price, but, also, the average cost. But where a dealer is selling livestock by weight, the invoice must, of course, show the actual price of the livestock to be multiplied by the weight. To illustrate, the Kansas City invoice reproduced on the following page is taken from *In re Saylor*, 44 Agric. Dec. ____, slip op. at 22 (Sept. 20, 1985) (decision on remand).

Kansas City Invoice from In re Saylor, 44 Agric. Dec. ___, slip op. at 22 (Sept. 20, 1985) (decision on remand.)

KANSAS CITY LIVESTOCK ORDER BUYING CO., INC.

628 LIVESTOCK EXCHANGE BUILDING — KANSAS CITY MISSOURI 64102

2

LEE THROCKMORTON 816-333-3206 | J. HAROLD SCHMIDT 816-331-4668 | WILL H. CORSON 913-432-0646

SAM CAMPBELL 816-333-6378 | ED GORMAN Bonner Springs, Kansas 913-721-2966 | OFFICE GLORIA EVANS

Area Code 816
PHONE 842-3255

Bought for the Account of —

GEORGE SAYLOR LIVESTOCK
P. O. BOX 287
PITTSFIELD, ILLINOIS 4

NO. 66

Date 5 October 1978 19__

3 Shipped to Millcrest

Via Angle - E. Richards

PURCHASED FROM	CATTLE	CALVES	HOGS	SHEEP	WEIGHT		PRICE	AMOUNT	TOTAL
[illegible]	27	Str			22155	17.72	6210	1375826	
	28				23195	17.76	6210	1440410	
	55		6		45350	5			2816236

Respondent's exhibit 1 #23

Average Weight 825

Average Cost 6220

10 line Off
10 Hangs Replaced

VACC. DEHORNING BRANDING	
INSURANCE	
TRUCKAGE	
LOADING CHARGE (RAIL)	
THRU FREIGHT	
FEED	
COMMISSION	4535
TOTAL	
CASH	8 2826771

The first "AMOUNT" shown on the Kansas City invoice, $13,758.26, is the product (result) of the "WEIGHT," 22,155 pounds (or 221.55 cwt), times the "PRICE," $62.10 per cwt, for 27 steers(221.55 x $62.10 = $13,758.26). Similarly, as can be expected, the second invoice "AMOUNT," $14,404.10, is the product (result) of the "WEIGHT," 23,195 pounds (or 231.95 cwt), times the "PRICE," $62.10 per cwt, for 28 steers (231.95 x $62.10 = $14,404.10).

Although both lots on this invoice were priced at $62.10 per cwt, the average cost, which is shown in the lower left-hand corner, is $62.20 per cwt. This average cost of $62.20 per cwt was determined by dividing the total cost, $28,207.71 (JO Ref. 8, p. 86), which includes the commission of $45.35 (shown immediately above the total cost), by the total weight, 45,350 pounds (or 453.50 cwt) (JO Ref. 6, p. 86) ($28,207.71 - 453.50 = $62.20).

Even though the average cost is shown on the Kansas City invoice reproduced above, the Kansas City invoice shows the actual price of the livestock under the heading "PRICE," and when you multiply the "WEIGHT" by the "PRICE," you get the "AMOUNT" invoiced to the customer. (Barring an occasional mathematical error, I have never seen an invoice such as the ones sent by respondents to the feeders in this case, where the "WEIGHT" multiplied by the "PRICE" did not equal the "AMOUNT.")

Returning to the 133 head invoiced to Schaake, since the figure shown under "PRICE" on respondents' invoice, $65.75 (JO Ref. 12, pp. 40, 82), is not the figure that was multiplied by the "WEIGHT" to obtain the "AMOUNT," it is mathematically impossible for respondents to contend that the figure shown under the heading "PRICE," $65.75 per cwt, was the dealer price of the livestock, as agreed upon by the parties.

The only alternative is that this was a commission transaction, in which respondents added all of their costs, including respondents' commission, to determine the "AMOUNT" (and then divided the "AMOUNT" by the "WEIGHT" to get the average cost, which was listed under "PRICE"). There is no other way the "AMOUNT" could have been determined (unless respondents had priced the 133 head at $65.75082 per cwt, and shown that amount as the "PRICE" to be multiplied by the "WEIGHT").

To conclude, respondents' invoice, which does not show a true price per cwt at which the livestock is being sold, is a "smoking gun," demonstrating that respondents were not selling the livestock to Schaake at a dealer price agreed to by the parties.

Respondents state in their brief filed in response to the Judicial Officer's tentative draft that a dealer selling livestock "would know the approximate amount of profit which could be added to his investment

and produce a total selling price which would not exceed the market price or the amount a prospective purchaser would pay" (Brief filed Feb. 9, 1987, at 10). A prospective purchaser would be reading or hearing market news reports expressed in dollars per cwt (e.g., Tr. 597). As respondents' brief states, "the only number appearing on the memoranda which was important to Mr. Schaake was his cost per hundred weight" (Brief at 15). Hence any agreement by Schaake and respondents to buy and sell livestock on a dealer basis would have been made in terms of the price per cwt. Respondents' failure to show any true price per cwt on their invoice is a "smoking gun," which would be sufficient evidence to support an inference that the transaction was a commission transaction even in the absence of any other evidence.

Respondents' reply to this point is to request that they be relieved from the stipulations filed before and during the hearing, and that the hearing be reopened for the purpose of receiving additional evidence. These requests are without merit.

The primary stipulations were filed July 23, 1985, at the outset of the hearing (Tr. 3–10). At the time those stipulations were entered into, complainant had not introduced any evidence or filed proposed findings and conclusions, so it was impossible for respondents to know the exact manner in which the stipulations would be used. Accordingly, respondents' contention that they did not know that "stipulated numerical values would be used in the manner set forth in the Judicial Officer's tentative draft" (Brief filed Feb. 9, 1987, at 3) is not persuasive. In any event, however, there is no valid basis for relieving respondents from their stipulations.

Moreover, the stipulations filed at the outset of the hearing and stated orally during the hearing (Tr. 444–46) have nothing to do with the Judicial Officer's analyses showing that respondents' invoices do not contain a true price per cwt. Those analyses are based solely on multiplying and dividing the figures set forth on the face of respondents' invoices!

Respondents specifically request (Brief at 3–5) that they be relieved of their stipulation that the Canadian-US conversion rate was 1.21 (e.g., Stipulations filed July 23, 1985, at 6, > 9(a); CX 41, col. 12). Here, again, the conversion rate has nothing to do with the Judicial Officer's analyses showing that the absence of a true price per cwt on the invoices is a weighty circumstance demonstrating that the transactions were commission transactions. The most that can be said on behalf of respondents is that if, as argued by respondents (Brief at 5), the conversion rate were carried out to four decimal places, e.g., 1.2101, the American cost, e.g., of the 144 head on CX 41, col. 12, would be \$89,609.79 (\$108,436.81 - 1.2101 = \$89,609.79) instead of \$89,617.20, the stipulated cost. That *de minimus* difference of \$7.41 (\$89,617.20 – \$89,609.79 = \$7.41) would not detract in the slightest

manner from the analysis set forth above (or from any of the other analyses set forth in this decision). To even raise the issue as to whether the rate of exchange should have been carried out to four decimal places (rather than two) indicates either a failure to understand the analyses set forth by the Judicial Officer, or an attempt to obfuscate the analyses.

Respondents' request to have the proceeding reopened for the purpose of receiving additional evidence is also without merit. Respondents concede that the additional evidence which they would like to adduce could have been introduced at the earlier hearing, if they had recognized its importance. However, that is no basis for reopening a hearing. As stated in *In re King Meat Co.*, 40 Agric. Dec. 1910, 1910-11 (1981) (order denying reopening), *aff'd*, No. CV 81-6485 (Aug. 11, 1983), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished):

> Respondent concedes that the evidence it would adduce was in its possession at the time of the original hearing, but was not considered of importance at that time. The case is identical, in this respect, to *In re DeJong Packing Co.*, 36 Agric. Dec. 1319, 1319-20 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980), in which it is stated:
>
> > The rules of practice provide that a "petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the final order" (9 CFR 202.21(a)(2)). Since respondent Hygrade's petition was filed after the issuance of the final order, it comes too late and is, therefore, denied.
> >
> > But even if the petition had been timely filed, it would have been denied. A timely filed petition to reopen the hearing must "set forth a good reason why such evidence was not adduced at the hearing" (9 CFR 202.21(a)(2)). This administrative requirement is similar to the judicial practice regarding newly discovered evidence (*see United States* v. *Bransen*, 142 F.2d 232, 235 (C.A. 9)). In that case it was held (*ibid.*):
> >
> > > Subsequent discovery of the importance of evidence which was in the possession of applicant for new trial, at the time of the trial, does not entitle him to a new trial upon the ground of newly discovered evidence.
>
> "Under this type of procedural rule, a proceeding will not be remanded if a party had full opportunity to present evidence at the original hearing, but failed to do so (*National Labor R. Board* v. *Weirton Steel Co.*, 135 F.2d 494, 497 (C.A. 3); *National Labor R. Board* v. *Aluminum Products Co.*, 120 F.2d 567, 573 (C.A. 7)." *In re Mountainside Butter & Egg Co.*, 38 Agric. Dec. 789, 795 (1978) (remand order), *final decision*, 39 Agric. Dec. 862 (1980), [*aff'd*, No. 80-3898 (D.N.J. June

23, 1982), *aff'd mem.*, 722 F.2d 733 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 1417 (1984)]; *accord*, *In re Winger*, 38 Agric. Dec. 182, 188 (1979).

> This principle is vital to the efficient handling of the Department's numerous regulatory cases. If a party were free to petition to reopen the hearing to take further evidence whenever it was discovered that additional evidence in the party's possession at the time of the original hearing would be helpful, it would completely disrupt the administrative process.

Furthermore, the additional evidence sought to be adduced by respondents would not undercut the analyses relating to the absence of a true price per cwt on respondents' invoices. Respondents would like to show that a dealer might determine his total selling price by (a) adding a certain percentage, e.g., 2%, to his total costs, (b) adding a desired profit amount, e.g., $2,000, to his total costs, or (c) adding a desired profit per cwt to his average cost per cwt, e.g., $1.10 (desired profit) + $63.03 (average cost) = $64.13 (selling price per cwt) (Brief filed Feb. 9, 1987, at 10–11).

Respondents then seek to show that such a dealer might prepare his invoice by (i) multiplying his selling price per cwt by the weight (e.g., $64.13 x 1,516.01 = $97,221.72), or (ii) multiplying the cwt by the expected profit per cwt (e.g., 1,516.01 x $1.10 = $1,667.61), adding the amount of the expected profit to his total costs (e.g., $1,667.61 + $95,560.89 = $97,228.50), and then dividing the total selling price ("AMOUNT") by the weight (e.g., $97,228.50 – 1,516.01 = $64.13), which would produce the average cost of $64.13 per cwt for the cattle (Brief at 11). Respondents also seek to show that the exact amount that a dealer would like to realize from the sale of cattle on a dealer basis varies because of the "'rounding' features of electronic calculators" (Brief at 12).

The problem with respondents' proposed evidence is that, even if it were adduced at a reopened hearing, it would not in any manner detract from the testimony in the record showing that irrespective of how a dealer determines how much he wants to receive for livestock to be sold on a dealer basis, it is the universal practice in the livestock industry for dealers to price livestock (not being sold by the head or for slaughter) at a price per cwt that is divisible by 5, e.g., $60.10, $60.25 (§ IV, *infra*). That is, even if a dealer followed the latter alternative set forth in respondents' brief to arrive at the average cost of $64.13 per cwt (clause "(ii)" in the preceding paragraph), the evidence shows that it is the universal practice in this country for the dealer to then price the livestock at a price divisible by 5, e.g., $64.15 per cwt (or, more likely, $64.25 per cwt). (Respondents already produced one purported expert, Mr. Frye, who gave unpersuasive testimony to the contrary (§ IV, *infra*)). Accordingly, the evidence sought to be introduced by respondents at a reopened hearing would not aid their cause.

If respondents mean to say that they would like to reopen the hearing to have a witness testify that, after a livestock dealer has determined the average selling cost of cattle as set forth above (e.g., $64.13), it would comport with trade practice in the livestock industry for the dealer to then put that average cost figure under the heading "PRICE" on an invoice, without showing on the invoice the actual price per cwt (which, when multiplied by the "WEIGHT" equals the "AMOUNT"), fortunately the "newly discovered evidence rule" precludes granting respondents' request, which, if granted, could produce nothing but incredible evidence. There just is no such custom in the livestock industry in the United States!

I. The Three Feeder Witnesses Involved in Respondents' Transactions, Each An Eminently Qualified Livestock Marketing Expert, Testified Categorically that All Livestock Involved in This Proceeding Was Purchased for Them by Donaldson on a 50c Per Cwt Commission Basis. Their Testimony Is Strongly Supported by Undisputed Documentary Evidence.

Each of the three feeder witnesses involved in the transactions at issue in this proceeding is an eminently qualified expert in the field of livestock marketing. Each testified categorically that his agreement with Mike Donaldson was for Donaldson to buy the livestock involved in this proceeding on a 50c per cwt commission basis. Their testimony to that effect, strongly supported by undisputed documentary evidence, is set forth in this section. The ALJ found the credibility of the feeder witnesses to be "strong and persuasive" (Initial Decision at 2), and that of Mike Donaldson to be, "at best, weak" (Initial Decision at 6).

Since I believe the testimony of the three feeder witnesses as to their agreement with Mike Donaldson, there is no need for me to consider other circumstances indicative of an agency relationship. That is, if there is an express agreement between two persons that one is to act as the agent of the other, an agency relationship is formed, and there is no need to consider whether other circumstances point in the direction of an agency relationship or a dealer transaction. *Restatement (Second) of Agency* §§ 1, 14K, 15, 26 (1958). Nonetheless, in later sections (<< III-VIII, *infra*), it is shown that there are other circumstances strongly indicative of an agency relationship, and no circumstance is inconsistent with an agency relationship.

A. Testimony of Donald E. Schaake (Confirmed Irrefutably and Mathematically as to Two Transactions Involving 144 Head and 46 Head (< I, Supra)).

1. Mr. Schaake Testified Categorically that (Except for One Dealer Transaction Not Alleged in the Complaint) All of Donaldson's Purchases for Him in March and April

1982 Were on a 50c Per Cwt Commission Basis. Mr. Schaake's Testimony Is Confirmed Irrefutably and Mathematically as to Two Transactions Involving 144 Head and 46 Head (§ I, Supra).

Donald E. Schaake entered the livestock feeding industry in 1946. Since 1960, he has been the president and major stockholder of Schaake Packing Company, Inc. (Schaake), a feeding company (and, also, a packing company until 1981), which is one-third owner of Washington Beef, Inc., a slaughtering and packing company. [27] Mr. Schaake is a member of the Washington Cattlemen's Association and the Washington Feeder's Association. He has been on the board of directors of Western Meat Association, an association consisting of packers in the 13 Western States for about 20 years, and he has been an officer of that association. (Tr. 205-07).

Schaake Packing Company has two feedlots of its own in Washington, and also feeds cattle in other feedlots in Washington and Montana. Between 1980 and 1985, it fed from 80,000 to 100,000 cattle per year. (Tr. 208-09).

Mr. Schaake testified that since 1980, he has bought between 50% and 70% of Schaake's cattle through commission agents, order buyers. The others he purchased direct from producers through Schaake's own employees. (Tr. 209-10). He purchases livestock through about 10 to 12 order buyers, including respondent Donaldson (Tr. 210-14). The commission rate is 50c per cwt for most of them, including respondent Donaldson (Tr. 214-19), and varies from 35c to 50c per cwt (Tr. 211).

Mr. Schaake had known respondent Donaldson for about 25 years. Respondent Donaldson began buying livestock for Schaake in about 1970. Respondent Donaldson was an order buyer for Schaake in most of the transactions with Schaake since 1970. (Tr. 213-15). With respect to the transactions at issue here, Mr. Schaake testified that they were all on a 50c per cwt commission basis. He testified (Tr. 214-19):

> Q. Do you recall the transactions which took place in approximately March and April of 1982 when Mr. Donaldson delivered to you livestock which he purchased in Canada?
>
> A. Yes.
>
> Q. How did those transactions come about, if you remember?
>
> A. Well, as I recall, Mike just prior to going to Canada and this happened, I think, just about every year, he was buying cattle for us in Montana. Then the market got such in Canada

[27] The other two feeders involved in this proceeding, Dick Van de Graaf and Arvid Monson, are the other two owners of Washington Beef, Inc. (Tr. 211-12).

that we could go up there, buy feeders, bring them down and be competitive with the local price.

Q. You mentioned that he was buying for you in Canada. What type of transactions were those?

A. Well, most of them, as I recall, were he was buying on a commission basis. Mike would call up and say we can buy cattle up here at a certain price. We would talk about the cost, testing the cattle and the exchange rate, freight, and figure out a price to deliver. I always considered -- to me it was more important what the cattle cost me delivered in the feedlot because of the variances and exchange rate and the freight if I were to have bought them in Canada.

. . . .

Q. With respect to these transactions concerning the livestock which were delivered to you from Canada in March and April of 1982 from Mr. Donaldson, do you remember how specifically these transactions came about, who contacted whom, how you first heard about this potential source of cattle?

A. Well, of course, Mike and I had been talking. He was up there and he would locate cattle, see what he thought he could buy them for, call me. We would talk about it, I would give him the go ahead to buy them or if they were too high not to buy them.

My understanding, of course, Mike at the same time was shipping cattle to various other buyers or feedlots at the same time and I knew that. He was an order buyer. He didn't buy for me exclusively. If I could use the cattle, a certain class of cattle, he would call me on those.

Q. Would you say that Mike Donaldson was well known as an order buyer in your trade area?

A. Oh, yes.

Q. As long as you have suggested that that is what you would call him, an order buyer, could you briefly define what you mean by order buyer?

A. An order buyer is a person that locates cattle and buys the cattle at a price that we have agreed upon, usually on a commission basis. Some of them carry our own draft book. Mike's office has carried our draft book, they have had it there. Rather than us sending them a check, they would pay for the cattle, draw the draft on us. Does that explain it?

Q. What did you consider Mr. Donaldson's responsibilities to be in the transactions concerning these Canadian cattle?

A. Mike and I would talk on the price. As soon as he bought the cattle he would immediately call me, I bought them

at "X" dollars. They will be shipped tomorrow or next week or something, ten days. Then Mike always took care of the exchange up there, he paid for them. He would get the Canadian money. Mike would take care of paying for all expenses, he would take care of payment of freight. It is just the way Mike did business. We have other order buyers that we pay the freight, but Mike is the only person in the last few years that we bought cattle -- all the cattle we bought out of Canada Mike Donaldson bought.

Q. What was Mr. Donaldson's compensation with respect to the Canadian cattle that you received in March and April of '82?

A. My understanding, most of the cattle we had one transaction, I believe, where Mike called up about 800 steers involved, we bought those at a price. I didn't know -- I don't recall, but I think he must have owned those ahead of time. Anyway, we bought those at a set price, 65-1/2 as I recall. [28] The balance of the cattle, it was my understanding, that Mike would buy them at the price up there. He figured the exchange rate, paid for them with Canadian money, add on 50 cents a hundredweight commission and all the expenses. That was my understanding of the way the cattle were priced to us.

Mr. Schaake further testified that (except for the one dealer transaction discussed in the following subsection) he was buying all his cattle from Mr. Donaldson on a commission basis during the period involved in this case (March and April 1982). He testified (Tr. 233, 252-53):

Q. With respect to those figures at the top of page 5, Complainant's Exhibit No. 56?

A. I see.

Q. Where would the commission be included?

A. I didn't have that in there.

Q. Did you understand this to be a commission transaction?

A. Yes, I sure did.

Q. Why did you understand it to be a commission transaction?

A. Because that is the way I was buying all these cattle at that time from Mike.

Q. Would Mr. Donaldson have been aware of this?

A. I am sure he was.

Q. How?

A. Just in our discussions.

[28] This dealer transaction is discussed below in the following subsection.

. . . .

Q. Why, in your opinion, could this [CX 68] not have been a transaction where Mr. Donaldson was buying and selling for his own account and speculating?

A. Well, that is just the way that Mike and I did business up there. We didn't -- he didn't speculate. As far as I knew we agreed on a price that we would pay up there on the cattle with Canadian money, Mike would buy the cattle, pay all the expenses and bill it.

Again, I will say that I presumed that he arrived by listing down all the expenses including freight, his commission, the $88,966.61 in American funds, divided that by the net weight, arrived at the 59.48. We didn't start with a figure -- let's say, okay, Mike, I will pay 59.48 for those cattle delivered. That is just not the way we did business.

One transaction happened this spring [i.e., 1985] which was different in California. Mike bought some steers down there on his own for his own account. Contracted, he told me, that day that he had contracted them. And I said, "Mike, I don't have any interest in buying cattle ahead. I don't like this market." So then the day that Mike took them he called me and he said he had those steers. Then, of course at that time they were too high, so I paid Mike a figure on those steers at a price what he paid for them in California. Mike lost, as far as I know, he lost his freight. He lost money. He took a position on those cattle, he bought the cattle himself.

As far as I know, the other cattle we bought we agreed ahead of time to go ahead and buy them at this figure and we paid Mike a commission on those cattle. Also on all the cattle Mike bought he paid the freight. They had their own truck, that is maybe where it got started.

As stated at the outset, Mr. Schaake is an eminently qualified livestock marketing expert. The ALJ believed his testimony that his agreement with Mike Donaldson was for Mr. Donaldson to buy the livestock involved in this case on a 50c per cwt commission basis. In addition, as shown in < I, *supra*, respondents' admissions irrefutably and mathematically confirm Mr. Schaake's testimony as to the transactions involving 144 head and 46 head. And the absence of a true price per cwt on a number of respondents' invoices to Schaake strongly supports Mr. Schaake's testimony that Mike Donaldson was buying the livestock on a commission basis. I affirm the ALJ's findings and conclusions as to all of respondents' purchases for Schaake.

2. <u>Respondents Distort the Undisputed Facts as to the Single Schaake-Donaldson Dealer Transaction During March-April 1982 in Respondents' Primary-Benefit-Test Argument</u>.

A partial digression from the testimony of the feeders is appropriate since respondents distort the record as to the single dealer transaction involving Schaake and Donaldson during the relevant time period.

Mr. Schaake testified that in one transaction during the relevant time period, March-April 1982, he bought 284 steers from Donaldson on a dealer basis at 65|c per cwt out of a total of about 800 (actually 834) that Donaldson had previously bought (Tr. 219, 227-28, 244-45). That transaction is not alleged as a violation in this case (Tr. 498; and see the Complaint). However, since the circumstances of this single dealer transaction have been grossly misstated in respondents' appeal, this transaction is discussed in detail. Respondents state in their appeal (Appeal Brief at 7-8):

> 1. <u>The Primary Benefit Test</u>.
>
> Unless it is shown that a person who acquires property from a third person and conveys it to another was acting primarily for the benefit of the other, then he is not an agent.
>
> Here, Mr. Donaldson purchased the cattle without knowing who would purchase the cattle from him. For example, Mr. Schaake, one of the complaining witnesses, admitted that, at least as to 800 head of cattle, Mr. Donaldson owned the cattle prior to selling them and that he agreed to buy them from Mr. Donaldson at a set price of 65.5 cents per pound (Tr. Vol. II, p. 219, 11. 1-8). If we assume that the steers weighed an average of 1,000 pounds, that sale represents over $500,000. Since the total sales to the complaining witnesses were $1,800,000 (Tr. Vol. III, p. 565, 1. 15), this one sale represents more than a fourth of all the sales.

In the first place, Mr. Schaake bought only 284 of the 800 (834) head (which are referred to in Mr. Schaake's testimony quoted above accompanying note 28, p. 91). Mr. Schaake testified (Tr. 227-28; and see Tr. 244-45):

> Q. You have testified a little bit earlier [Tr. 219 (quoted in testimony accompanying note 28, p. 91)] to a transaction involving Canadian cattle in which you believe Mr. Donaldson may have acted as a speculator. Do you recall that transaction at all at this time?
>
> A. I only recall it because we had the purchase invoices on them. We -- going through cattle we bought from Mike -- I saw it there we bought, I believe it is 280 steers, at 65-1/2. I am sure those cattle were purchased when Mike called and said, "I have those steers, I have 65-1/2 for them," and we said, "Do it." Yes, I considered he bought those cattle or he bought them ahead, I don't know.
>
> Q. Those were priced at 65-1/2 you said?
>
> A. Yes, I believe.
>
> Q. Do you happen to have the documentation for that transaction?

A. I believe I do. I have the draft here. 284 steers.

Q. Have you located that?

A. Yes.

Q. Would that be 65-1/2 exactly?

A. Yes.

In the second place, an examination of the complaint reveals, and Mr. Kienow, complainant's Regional Supervisor, testified, that the 284 head were not alleged as a violation in the complaint (Tr. 498; and see the Complaint).

In the third place, the 800 head (actually 834 head; Tr. 498; CX 70, p. 1) were broken into lots of 311 head, 284 head, and 239 head (CX 71, p. 1; 311 + 284 + 239 = 834), and the 239-head lot was also not alleged as a violation (Tr. 498). Only the 311-head lot (shipped to Van de Graaf) was alleged as a violation (Complaint at 5, ¶ V (reduced to 310 head because 1 head was rejected at the border (CX 71, p. 1)). And Mr. Van de Graaf testified that these cattle were purchased by Donaldson for Van de Graaf on a commission basis (Tr. 318-20).[29] Hence respondents' argument completely distorts the facts as to this transaction.

Respondent Donaldson's testimony also corroborates Mr. Schaake's testimony that he only received 284 head of the total lot, and that this was a dealer transaction. Mr. Donaldson's explanation is also supportive of Mr. Schaake's testimony that their usual manner of business was for Mr. Donaldson to call Mr. Schaake before making a purchase. Respondent Donaldson testified (Tr. 806-08, 818):

Q. What is the transaction as reflected by Exhibit 72?

A. This is a -- looks like a receiving document from Van de Graaf Ranches.

[29] There is no inconsistency in the fact that part of the 834 head (Schaake's 284 head) were on a dealer basis and part (Van de Graaf's 311 head) were on a commission basis. Mr. Schaake's instructions to Mr. Donaldson required Mr. Donaldson to telephone him before buying the livestock for him, so that Mr. Schaake could give final approval to the commission transaction before the purchase. The record does not show Van de Graaf's specific instructions to Donaldson with respect to this transaction, but there is no evidence, and no reason to believe, that after a general discussion was had between Van de Graaf and Donaldson, Van de Graaf also requested Donaldson to make another telephone call to obtain final approval before purchasing 311 head for him. Hence when Donaldson bought 834 head, originally intending to deliver them to Schaake, after Schaake took only 284 head, there was nothing improper or irregular about Donaldson using 311 head to fill Van de *Graaf's prior* order (assuming no unjust discrimination). (The ALJ and I have accepted Van de Graaf's testimony that the 311 head were purchased on a commission basis over Donaldson's testimony that they were on a dealer basis.)

Q. Do you have a specific recollection of this transaction?

A. I do.

Q. Would you tell us about your acquisition of cattle in that transaction?

A. I can't remember the exact day, but I was leaving -- I bought cattle and sent them to Schaake out of the Calgary market, and I told Don [Schaake] that I was going up into northern Alberta above Edmonton to look at 850 head of steer. He told me then, he says, "Well, when you get them looked at, call me back."

When I went and looked at the cattle, I bought them, and I called him back two days later and told him I had bought the cattle and he said, "I thought you were going to call me," and I said, "I thought it was worth the money and I didn't need to call you."

He then said, "Well, I can't use the steers. There's too many of them," and he didn't want any light cattle. In this particular set of steers that we bought was an exceptionally fancy set of big, fleshy Charolais crossbreed steers. I described them to Don [Schaake], and he asked if I could get rid of the rest of them.

. . . .

A. Anyway, I told him that I thought I probably could and we discussed the price of the cattle. When he asked me what it was going to cost, I said, "Oh, I can deliver the cattle to you around 65-1/2 to 66."

The statement back to me was, "You always tell me a price and then it's always more than what you told me." I said, "In this case, I will guarantee the cattle to you for $65.50."

So, I went and I did that. I took the top end of the cattle and sold them to Schaake. I called Van de Graaf and sold him, in my estimation, the tail ends of the cattle, and I shipped -- there was a real light fancy ends of the steers that I sold to Kenny Ardell.

Q. Is the transaction that's reflected by Exhibit 72 the same transaction in which you sold this portion of the livestock you bought for Van de Graaf?

A. That's right.

. . . .

Q. I believe you have also testified that you do recall a transaction to Mr. Schaake where you delivered livestock to Mr. Schaake, 284 head of livestock?

A. I believe so.

Q.And you recall that as being at $64 or $65.50?

A. I think it was.

Q. And you said it was a dealer transaction?

A. That is a dealer transaction. That is one that I said that Don Schaake recalled as a dealer transaction.

Respondent Donaldson's admission that Mr. Schaake had instructed him to obtain final telephone approval after looking at the livestock but before buying them for Schaake is entirely consistent with Mr. Schaake's testimony that this was originally supposed to be a commission transaction. However, after Donaldson bought the 834 in advance (contrary to instructions), Schaake was willing to buy 284 of the 834 head on a dealer basis.

Continuing the digression from the testimony of the three feeders (in order to discuss the remainder of respondents' primary-benefit-test argument), respondents argue (Appeal Brief at 8):

> Mr. Denoon, one of the Canadians through whom Mr. Donaldson purchased the cattle, testified that Mr. Donaldson's practice was to purchase the cattle and then call to find buyers for the cattle (Tr. Vol. IV, p. 771, 11. 19–25; p. 772, 1. 1).

First, Mr. Denoon was not an unbiased witness. He valued his extensive business relationship with respondents. When complainant's investigators asked Mr. Denoon for copies of his business records involving respondents, Mr. Denoon contacted respondent Donaldson, and, at Mr. Donaldson's request, Mr. Denoon refused to let complainant's investigators copy the records (Tr. 123–25).

Similarly, when a livestock investigator with the Royal Canadian Mounted Police (RCMP) attempted to obtain the records for complainant, Mr. Denoon contacted respondent Donaldson and Donaldson's lawyer, and again refused to let the records be copied. Mr. Denoon did not permit the RCMP to copy the records involving respondents until over 2 months later. (Tr. 525–35). [30]

Second, the record references cited by respondents relate to Mr. Denoon's testimony that he overheard respondent selling livestock after he bought them from Mr. Denoon. But Mr. Denoon did not identify the parties to whom Mr. Donaldson was speaking. There is no evidence in the record that Mr. Denoon ever overheard a telephone conversation between Mr. Donaldson and the three feeders involved in this case. (The three feeders involved here are involved in only a small portion of respondents' total transactions.)

[30] Mr. Denoon was required under Canadian law to make his records available to the RCMP, and Mr. Denoon could have been charged with obstruction under the Canadian Livestock Products Act for refusing to furnish records involving respondents to the RCMP. However, the RCMP investigator did not press the matter for 2 months because Mr. Denoon had a medical problem (Tr. 532–33).

In any event, however, even if we assume (without record support or any logical basis for an inference) that Mr. Denoon overheard Mr. Donaldson talking to the three feeders involved here, Mr. Denoon's testimony shows that his view that Mr. Donaldson was on the phone selling the cattle after he bought them was based on overhearing one side of telephone conversations which were entirely consistent with commission transactions. Specifically, Mr. Denoon testified (Tr. 771-72):

> Q. Can you point to anything else which made you think that he [Donaldson] was not an agent for someone else?
>
> A. Because he had less time -- after he got the cattle and everything, he would be on the phone selling the cattle.
>
> Q. Because he would get on the phone and make arrangements --
>
> A. You can't help but hear conversations. He would be selling the cattle.
>
> Q. What did he say in these conversations?
>
> A. Described the cattle, and tell them what they would cost.

Mr. Denoon obviously was not in a position to know whether Mr. Donaldson had previously had discussions with the feeders in which they had requested Mr. Donaldson to buy livestock for them on a commission basis. Not being aware of those earlier conversations, it is entirely understandable that Mr. Denoon misconstrued Mr. Donaldson's discussions with the feeders as sales discussions when, in fact, they were merely discussions in which Mr. Donaldson was confirming the exact numbers and the exact costs after the livestock was purchased on commission for the feeders pursuant to their prior orders.

The feeders testified that they were in daily telephone contact with Mr. Donaldson (Tr. 219-45, 296-314, 318-19, 390-91). For example, as quoted above, Mr. Schaake testified (Tr. 218):

> As soon as he [Donaldson] bought the cattle he would immediately call me, I bought them at "X" dollars. They will be shipped tomorrow or next week or something, ten days.

In the circumstances, the ALJ properly gave little weight to Mr. Denoon's testimony.

Respondents next argue that "Mr. Para, one of the Americans to whom Mr. Donaldson sold cattle, testified that it was Mr. Donaldson's practice to sell him cattle at the end of the day after Mr. Donaldson had already purchased them (Tr. Vol. IV, p. 779, 11. 8-20)" (Appeal Brief at 8). That fact is undoubtedly true, but totally irrelevant here!

It is quite common in the livestock industry for a person or firm to engage in business as a market agency, buying on commission, and also as a dealer (in other transactions). McCoy, *Livestock and Meat Mar*

keting 137 (1978). Respondents were registered in both capacities during the relevant time period (Findings 2, 6, *supra*, pp. 21–22, under the heading "E. *Identificational, Jurisdictional, Historical and Additional Credibility Findings*"). The practice of registering in both capacities is so common that complainant uses a stamp in its registration activities to show (CX 1, p. 6):

> Registered as a market agency, buying and selling on commission at____. Also registered as a dealer with the provision that no purchases as a dealer will be made out of consignments and that any dealer sales by this firm through the market agency facilities must be in accordance with the regulations.

In *Valley View Cattle Co.* v. *Iowa Beef Processors, Inc.*, 548 F.2d 1219, 1222 (5th Cir.), *cert. denied*, 434 U.S. 855 (1977), the court described the terms "Packer buyer," "Order buyer," and "Dealer," and recognized that a "cattle buyer can function in different capacities in different transactions."

Accordingly, the fact that Mr. Para bought livestock from Mr. Donaldson on a dealer basis is totally irrelevant in determining whether respondent bought livestock for the three feeders involved here on a commission basis.

Finally, respondents rely on Mr. Donaldson's testimony that it was "his practice to buy the cattle at auction without buying for a specific person, and then to reach agreement with a buyer over the phone at the end of the day (Tr. Vol. IV, p. 796, 11. 7–25; p. 797, 11. 1–2)" (Appeal Brief at 8).

In the first place, where an order buyer has a number of orders to fill on commission for various principals, it is not improper or unlawful for the order buyer to buy enough livestock at a sale to fill all of the orders, and then decide later in the day which livestock will be assigned to which order (so long as there is no unjust discrimination).

In any event, however, the ALJ, who saw and heard the witnesses testify, expressly stated that the "credibility of respondent Mike Donaldson was, at best, weak" (Initial Decision at 6; and see Initial Decision at 25), and that the credibility of the three feeders was "strong and persuasive" (Initial Decision at 2). There is no basis for setting aside the ALJ's determination as to the credibility of the witnesses (see § IX, *infra*).

Respondents comment that "[o]ne can only wonder if the complaining witnesses would be so anxious to claim an agency relationship if, as in the *Iowa Beef* cases, the auction yards had remained unpaid after delivering the cattle, and Mr. Donaldson took the money into a bankruptcy proceeding" (Appeal Brief at 9). If that were to occur, the feeders should be held liable to the unpaid livestock sellers. See *Lubbock Feed Lots, Inc.* v. *Iowa Beef Processors, Inc.*, 630 F.2d 250,

254-77 (5th Cir. 1980); *Valley View Cattle Co. v. Iowa Beef Processors, Inc.*, 548 F.2d 1219, 1220-24 (5th Cir.), *cert. denied*, 434 U.S. 855 (1977).

B. Testimony of Dick Van de Graaf, Strongly Supported by Undisputed Documentary Evidence as to Two Transactions Involving 272 Head and 585 Head.

1. Mr. Van de Graaf Testified Categorically that All of Donaldson's Purchases for Him in March and April 1982 Were on a 50c Per Cwt Commission Basis.

Dick Van de Graaf entered the livestock feeding industry on his own in 1956. Since about 1965, he has been the president of Van de Graaf Ranches, Inc. (Van de Graaf), a feeding company. He is one-third owner (together with Schaake and Monson) of Washington Beef, Inc., a slaughtering and packing company. Mr. Van de Graaf is past president of Yakima, Washington, State Cattle Feeders' Association, and is a member of the Washington Cattle Feeders and Cattlemen's Association. (Tr. 283-90).

Between 1980 and 1985, Mr. Van de Graaf fed about 80,000 cattle per year, or more. (Tr. 286-87).

Mr. Van de Graaf testified that since 1980, he has bought about 75% of his cattle through commission agents, order buyers. The others he purchased direct from producers by himself or through a salaried buyer. (Tr. 287-88). He purchases livestock through about 10 to 12 commission buyers, including respondent Donaldson (Tr. 288-92). The commission rate is 50c per cwt for most of them, including respondent Donaldson (Tr. 291-92, 302-04, 317, 320), and varies from 25c to 50c per cwt (Tr. 289).

Mr. Van de Graaf had known respondent Donaldson for about 20 years. Respondent Donaldson began buying livestock for Mr. Van de Graaf in about 1970. Respondent Donaldson was an order buyer for Mr. Van de Graaf in most of the transactions with Mr. Van de Graaf since 1970. (Tr. 290-91). With respect to the transactions at issue here, Mr. Van de Graaf testified that they were all on a 50c per cwt commission basis. He testified (Tr. 291-92, 302-04, 317, 320):

> Q. Do you recall transactions which took place with Mr. Donaldson in March and April of 1982 when you were delivered cattle from Canada?
>
> A. Yes.
>
> Q. How did those transactions come about in terms of who contacted whom?
>
> A. Mike called us and wanted to purchase cattle for us in Canada. We have used other buyers, but he called us up. So we didn't see anything wrong with that. We said we wanted the purchase weight tickets and the invoice weights what he pur

chased the cattle for. We paid him a rate of 50 cents a hundredweight for the cattle, commission. He said also that the cattle should come on -- get a 4 percent shrink on the cattle. The cattle should all come delivered to our place with a 4 percent, it should come on the net weight, it should come in on the net weight with the 4 percent deducted.

. . . .

Q. Now, would you have received page 1 which deals with the 585 head? That would be page 1 of Complainant's Exhibit 32. Would you have received that accounting [, which is reproduced below, showing as to 585 steers invoiced by respondents to Van de Graaf Ranches @ 638,901 pounds, "PRICE" $63.35 per cwt, total cost ("AMOUNT") $404,786.56 (CX 28, p. 3; CX 32, p. 3), a breakdown of the 585 steers into 11 lots, showing as to the individual lots the place of purchase and loading date, the weight, the average cost, and the trucker] on page 1 before or after the actual receipt of the 1468 [head, which included the 585 head included in the breakdown]?

A. After the cattle was delivered.

Q. Why did you ask for it or why did you receive it?

A. Because that is our procedure to operate in business, you know. With these commission order buyers we want those weights. When the cattle was weighed up, we want those invoice slips unless we have a specific understanding we bought those cattle so much delivered to the feedlot or pay them so much money for the cattle they maybe had to sell, but these are a commission deal, transaction, it is not a dealer transaction. It is a commission deal. We pay him 50 cents and we asked for, which normally we do this with everybody we buy cattle from, we want the buying weights and what he paid for every animal in that lot. That is all we ask for. We have no problem with anybody else delivering those weights and the invoice.

Q. Mr. Van de Graaf, in addition to the discussions that you had with Mr. Donaldson concerning these deals, can you personally tell by looking at the documentation in Complainant's Exhibit No. 32, pages 1 through 7, can you tell whether this is a commission deal or whether this might be a deal where Mr. Donaldson had speculated on the livestock?

A. It showed he tried, he tried to speculate on the cattle. That isn't the deal we have. It is a commission deal. Why would we want to buy in our operation, speculate, have him speculating to buy cattle to do whatever he wants to do. We do not do that. Mike Donaldson has been in business many years. He understands what he is required to do.

. . . .

Mr. Van de Graaf, would you just tell us for the record what is on page 1 of Complainant's Exhibit 40 [re 222 steers found as a violation]?

A. This is cattle weighed off at our feedlot on our scale, weighed off there and counted. . . .

Q. What type of transaction was this, Mr. Donaldson?

A. Commission deal. 50 cents a hundredweight.

. . . .

Q. Take a look at page No. 3 of Complainant's Exhibit 72 [re 310 steers found as a violation].

. . . .

Q. What type of transaction was this?

A. Commission sale.

As stated at the outset, Mr. Van de Graaf is an eminently qualified livestock marketing expert. The ALJ believed his testimony that his agreement with Mike Donaldson was for Mr. Donaldson to buy the livestock involved in this case on a 50c per cwt commission basis. And as shown in the following subsection, Mr. Van de Graaf's testimony is strongly supported by undisputed documentary evidence. I affirm the ALJ's findings and conclusions as to all of respondent's purchases for Van de Graaf.

2. Undisputed Documentary Evidence Strongly Supports Mr. Van de Graaf's Testimony as to Two Transactions Involving 272 Head and 585 Head.

The documentary evidence referred to in this subsection, unlike that referred to in § I as to Schaake, does not prove irrefutably and with mathematical precision that respondents' invoice price to Van de Graaf included respondents' 50c per cwt commission. But the documents are, nonetheless, "smoking guns," strongly supportive of Mr. Van de Graaf's testimony in this respect.

a. Respondents' Invoice Shows that the 272 Head and 585 Head Were Not Invoiced at a Dealer's Price.

Respondents' invoice to Van de Graaf for 1,468 head, including a lot of 272 heifers and another lot of 585 steers, which are the only lots on the invoice alleged in the complaint, is reproduced on the next page (CX 28, p. 3; identical to CX 32, p. 3).

Respondents' Invoice to Van de Graaf for 1,468 Head (CX 28, p. 3; CX 32, p. 3)

INVOICE
MIKE DONALDSON
SPENCER LIVESTOCK COMMISSION COMPANY
P O Box 1222
Lewiston, Idaho 83501

DATE: 3-10-82

Sold To: Van de Graaf Ranches
Rt. 1, Box 1378
Sunnyside, WA 98944

PURCHASED FROM	NO HEAD	KIND	AVE. WT		WEIGHT	PRICE	AMOUNT
	376	strs	1094		411658	62.16	255927.77
	179	hfrs	919		164570	60.50	99569.06
	585	strs	1092		638901	63.35	404786.56
	272	hfrs	994		270457	57.83	161817.29
	56	strs	1038		58180	61.56	35820.79
	1468				1543766		957921.77
					Advance	<	400,000->
					Advance	<	400,000->
							157921.77

By ______________________

TOTAL ______________________

PRINTCRAFT PRINTING

The invoice dated March 10, 1982 (JO Ref. 103, p. 105), is for a total of 1,468 head of livestock (JO Ref. 122, p. 105). The record is silent as to the 376-head lot, the 179-head lot, and the 56-head lot, shown on the invoice reproduced on the preceding page, since those lots were not included in the complaint in this proceeding.

Included in the total of 1,468 head are 272 heifers (JO Ref. 114, p. 105), with an average weight of 994 pounds (JO Ref. 115, p. 105), a total "WEIGHT" of 270,457 pounds (JO Ref. 116, p. 105), a "PRICE" of $59.83 per cwt (JO Ref. 117, p. 105), and a total cost ("AMOUNT") of $161,817.79 (JO Ref. 118, p. 105).

The first item of documentary evidence strongly supporting Mr. Van de Graaf's testimony that the 272 heifers were purchased by respondents for Van de Graaf on a commission basis, rather than being sold to Van de Graaf on a dealer basis, is respondents' invoice itself. If this were a dealer transaction, in which respondents were selling the 272 heifers to Van de Graaf on a dealer basis at a price agreed upon by the parties, the "WEIGHT" shown on the invoice, 270,457 pounds (or 2,704.57 cwt) (JO Ref. 116, p. 105), multiplied by the "PRICE," $59.83 per cwt (JO Ref. 117, p. 105), would equal the invoice "AMOUNT," $161,817.79 (JO Ref. 118, p. 105). *It does not*!!!! The product (result) of the "WEIGHT" times the "PRICE" is $161,814.42 (2,704.57 x $59.83 = $161,814.42), a difference of $3.37 from the amount shown on respondents' invoice ($161,817.79 (JO Ref. 118, p. 105) - $161,814.42 = $3.37).

Here, as in the case of the invoice to Schaake dated March 15, 1982, discussed in § I(C)(2), the figures under the heading "PRICE" are not really the price of the animals. (In addition, as shown in § IV, *infra*, respondents' invoice prices to Van de Graaf for 98 head and 222 head involved in this proceeding are actually average-cost figures, rather than true price figures.)

The actual products (results) obtained by multiplying each "WEIGHT" by the "PRICE" shown on the invoice, and the difference in each case between the actual product (result) and the "AMOUNT" shown on respondents' invoice are set forth on the following page, which reproduces the invoice as previously reproduced on page 105, but off-center so that two additional columns can be added at the right, showing the actual product (result) of the "WEIGHT" times the "PRICE," and the difference between the actual amount and the "AMOUNT" as shown on respondents' invoice.

Respondents' Invoice to Van de Graaf for 1,468 Head (X 28, p. 3; CX 32, p. 3)

INVOICE
MIKE DONALDSON
SPENCER LIVESTOCK COMMISSION COMPANY
P.O. Box 1222
Lewiston, Idaho 83501

DATE: 3-10-82

To Van de Graaf Ranches
Rt. 1, Box 1378
Sunnyside, WA 98944

NO HEAD	KIND	AVE. WT		WEIGHT	PRICE	AMOUNT	Actual Amount of Weight Times Price	Difference
376	strs	1094		411658	62.16	25592277	$255,886.61	$ 41.16
179	hfrs	919		164520	60.50	99569.06	99,564.85	4.21
585	strs	1092		638701	63.35	404786.56	404,743.78	42.78
272	hfrs	994		280457	57.83	161817.79	161,814.42	3.37
56	strs	1038		58180	61.56	35820.79	35,815.61	5.18
1468				1543766		95792177		
				Advance	<	400,000>		
				Advance	<	400,000>		
						15792177		

TOTAL

Here, as in the discussion in § I(C)(2), *supra*, it is quite easy to determine that the figures on the invoice for the 1,468 head included under the heading "PRICE" are actually average-cost figures, rather than true price figures. That is, if we multiply each "WEIGHT" by its corresponding "PRICE," the product (result) is not the "AMOUNT" shown on the invoice. That proves conclusively that the figure under the heading "PRICE" is not really a dealer's price for the animals.

Conversely, if we divide the figures under the heading "AMOUNT" by the "WEIGHT," we obtain the figures shown on the invoice under the heading "PRICE," which is actually the average cost of the animals.

Furthermore, in this case, there is additional undisputed documentary evidence showing that the "PRICE" figures are actually average-cost figures, rather than price figures, and that the average cost includes a 50c per cwt commission. Specifically, we have the breakdowns submitted by respondents to Van de Graaf with respect to the 272-head lot and the 585-head lot, which are the only two lots from the 1,468 head invoiced to Van de Graaf by respondents on March 10, 1982, that are involved in this case.

b. Respondents' Breakdown as to the 272-Head Lot Shows that the Invoice "PRICE" Is Actually the Average Cost, and that the Average Cost Includes Respondents' 50c Per Cwt Commission.

Mr. Van de Graaf testified that after he received respondents invoice dated March 10, 1982, for the 1,468 head (JO Ref. 103, 122, p. 105), he was not satisfied, and asked respondents for the "invoice slips" (Tr. 303) and the "scale tickets" (Tr. 293; and see Tr. 293-303). The breakdown received from respondents as to the 272-head lot is reproduced on the next page (CX 28, p. 1).

Respondents' Breakdown as to the 272-Head Lot (CX 28, p. 1)

124 → Loyd - 4 125 → 39 126 → 41807 127 → 24 462,28 128 → Roberge

duty 129 → 463 07

Lundeke 3/8 / 82 Carrier 130 → ~~209,04~~ 131 → 60.12

132 → 25,134,39

Calgary 3/8/83 - 58 51650 31138,73 60.25 Parkland

Calgary 3/8/82 54 51315 30573,76 59.58 Parkland

~~Calgary~~

Calgary 3/9/82 9 8540 5165,34 60.45 Parkland

Calgary 3/9/82 56 53360 31,712,57 59.42 Bill Fr.

Calgary 264 52 261962 55280 ... 156720,44 32 945,70 59.57 Randy Sliwa

Calgary 8 8485 5047 35 59.4 Polarity

133 → 272 134 → 270,457 135 → 161,817,79

136 → 20,593

137 → 90 994

Respondents' breakdown shows that the 272-head lot invoiced to Van de Graaf as a single lot weighing 270,457 pounds at a total cost ("AMOUNT") of $161,817.79 (JO Ref. 114-118, p. 105) was purchased [31] by respondents in seven separate lots.

The information in the left-hand column shows where each lot was purchased, and when it was loaded. For example, the first lot of 39 head (JO Ref. 125, p. 110) was purchased from Weiller & Williams (Lloyd) at Lloydminister, Canada (abbreviated as "Loyd" (JO Ref. 124, p. 110; Tr. 433; CX 25, p. 1, left-hand column labeled "ORIGIN")). The trucker for that lot, Roberge, is shown in the right-hand column (JO Ref. 128, p. 110; see CX 25, p. 1, column 9). The weight of the 39 head is 41,807 pounds (or 418.07 cwt) (JO Ref. 126, p. 110).

Respondents' breakdown shows that the figure shown on the invoice for the 272 head under the heading "PRICE," *viz.*, $59.83 per cwt (JO Ref. 117, p. 105), is actually the average cost of the 272 head. That is, at the bottom of the breakdown, after the weights and costs for the seven lots have been totaled (JO Ref. 134, 135, p. 110), the breakdown shows the average cost, i.e., "ac 59.83" (JO Ref. 136, p. 110). The average cost was determined by dividing the total cost, $161,817.79 (JO Ref. 135, p. 110), by the total weight, 270,457 pounds (or 2,704.57 cwt) (JO Ref. 134, p. 110), i.e., $161,817.79 - 2,704.57 = $59.83. Hence the breakdown shows quite clearly what has already been proven, *viz.*, the "PRICE" figures shown on respondents' invoice do not really show the *price* at which livestock is being sold, but, rather, show the *average cost* of the lot. [32] And as shown below, the average cost includes respondents' 50c per cwt commission.

For the *first* of the seven lots shown on the breakdown, i.e., the 39-head lot (JO Ref. 125, p. 110) weighing 41,807 pounds (or 418.07 cwt) (JO Ref. 126, p. 110), the breakdown shows three components of the total cost, *viz.*, the initial cost, $24,462.28 (JO Ref. 127, p. 110), the duty, $463.07 (JO Ref. 129, p. 110), and a commission of $209.04 (JO Ref. 130, p. 110), which is at the rate of 50c per cwt ($.50 x 418.07 = $209.04). The total cost of the 39-head lot, i.e., the amount

[31] The use of the word "purchased" does not, of course, imply that respondents purchased the livestock for themselves as a dealer. That is, the 272 heifers were either "purchased" by respondents on a commission basis for the feeders (as the ALJ and I have found), or they were "purchased" by respondents for themselves, for later resale on a dealer basis (as contended by respondents).

[32] Similarly, the breakdown shows at the bottom (under the average cost) the average weight, "aw 994" (JO Ref. 137, p. 110). The average weight was determined by dividing the total weight, 270,457 pounds (JO Ref. 134, p. 110), by the number of head, 272 (JO Ref. 133, p. 110), i.e., 270,457 - 272 = 994. That average weight figure, 994, is included on respondents' invoice to Van de Graaf under the heading "AVE. WT." (JO Ref. 115, p. 105).

paid by Van de Graaf for the 39 head, is $25,134.39 (JO Ref. 132, p. 110). The average cost for the 39-head lot is $60.12 per cwt (JO Ref. 131, p. 110; $25,134.39 (JO Ref. 132, p. 110) - 418.07 cwt (JO Ref. 126, p. 110) = $60.12 per cwt).

The remaining six lots in the breakdown do not show any components of the total cost, such as duty and commission, but merely include the total amount Van de Graaf paid for each of the six lots. We know that the total-cost figure shown for each of the seven lots is the cost to Van de Graaf for each lot because the sum of the total-cost figure for the first 39-head lot ($25,134.39 (JO Ref. 132, p. 110)) and the remaining six total-cost figures equals $161,817.79 (JO Ref. 135, p. 110; $25,134.39 + $31,138.73 + $30,573.76 + $5,165.29 + $31,812.57 + $32,945.70 + $5,047.35 = $161,817.79), which is the amount invoiced to Van de Graaf for the 272 head (JO Ref. 118, p. 105).

Furthermore, we know that all of the dollar figures shown on the breakdown for the 272 head are in United States funds, for the same reason just mentioned, i.e., the sum of all the total-cost figures for the seven lots listed in the breakdown is the exact amount invoiced to Van de Graaf (JO Ref. 135, p. 110; JO Ref. 118, p. 105). [33] (Since the total-cost figure for the first 39-head lot ($25,134.39) is in United States funds, it is a mathematical certainty that the three amounts included in that total, i.e., the initial cost, $24,462.28, the duty $463.07, and the commission, $209.04, are also in United States funds ($24,462.28 + $463.07 + $209.04 = $25,134.39)).

The crucial question is whether only the first of the seven lots shows the duty and commission broken out separately so as to serve as an illustration for the other six lots (thereby avoiding the tedious task of showing the similar breakdown as to each of the remaining six lots), or whether the duty and commission items are applicable only to the first lot.

For a number of reasons, I infer that the total cost of each of the seven lots includes duty and commission (i.e., respondents' 50c per cwt commission), even though duty and commission are separately itemized only for the first lot.

First, we know *positively* that *duty* is included in the total cost of *each* of the remaining six lots even though it is separately itemized only for the first lot. The origin of the remaining six lots is shown as Calgary

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[33] Van de Graaf paid the invoice for the 1,468 head in United States funds, *viz.*, by two advances of $400,000 each (sight drafts drawn on the Rainier National Bank, Yakima, Washington), and by a sight draft for $157,921.97 drawn on the same bank (CX 28, pp. 3-6) ($400,000 + $400,000 + $157,921.97 = $957,921.97, the amount of the invoice for the 1,468 head (JO Ref. 123, p. 105)).

(left-hand column of the breakdown), which is in Canada. Accordingly, duty is necessarily included in the total cost of the remaining six lots even though it is separately itemized only for the first lot. In fact, the exact amount of the duty for each of the seven lots has been stipulated (Stipulations filed July 23, 1985, at 3, ¶ 5(a); CX 25, p. 1, column 15).

Second, we know *positively* that the commission shown in the breakdown as to the first lot, $209.04 (JO Ref. 130, p. 110), is at the rate of 50c per cwt in United States funds (i.e., $.50 x 418.07 (JO Ref. 126, p. 110) = $209.04 (JO Ref. 130, p. 110)). As stated above, the sum of the total-cost figures (which, for the first lot includes a commission of $209.04, i.e., 50c per cwt) for the seven lots equals the amount invoiced to Van de Graaf.

As shown in § I, *supra*, there is no logical reason why a 50c per cwt commission in United States funds would be paid to anyone other than respondents. In fact, as shown above, *supra* note 26, p. 79, *all of the commissions paid by respondents to others in all of the transactions involved in this proceeding* as to which the record contains documentary evidence of respondents' expenses *were included in Canadian invoices, which respondents admit were paid in Canadian funds.* Hence, although we do not have enough data as to the 39-head lot to prove with mathematical certainty, as we did in § I, that the 50c per cwt commission in United States funds shown in respondents' breakdown was respondents' commission, rather than a commission paid by respondents to someone else, the record here, when viewed in the light of logic and a knowledge of livestock marketing, compels me to infer that the 50c per cwt commission in United States funds shown for the first 39-head lot is respondents' commission.

Furthermore, there is no logical reason why Mr. Van de Graaf would have asked respondent Donaldson to go to Canada and buy 272 heifers, 39 on a commission basis and the remainder on a dealer basis. Respondents do not argue that any of the transactions were commission transactions, in part, and dealer transactions, in part. Respondents contend, contrariwise, that all of the transactions were of the same type, *viz.*, dealer transactions. Similarly, complainant and the three feeders involved in this case contend that all of the transactions were of the same type, *viz.*, commission transactions. Hence the documentary evidence showing that a 39-head portion of the 272-head lot was purchased by respondents on a 50c per cwt commission basis is very strong evidence that all of the components of the 272-head lot were purchased by respondents for Van de Graaf on a 50c per cwt commission basis.

Third, it would have served no useful purpose for respondents to have separately itemized the duty and the 50c per cwt commission for the remaining six lots. The commission can be computed for each lot

merely by multiplying .5 (i.e., \$.50) times the weight (i.e., cwt).[34] The duty can be calculated mentally merely by moving the decimal point of the weight two places to the left, i.e., the duty on 41,807 pounds is \$418.07, (see note 13, *supra*, p. 52). (In addition, there is a relatively insignificant brokerage and veterinarian fee (e.g., \$45) paid to the Customs broker, which respondents include in their duty figure (\$418.07 + \$45 = \$463.07 (JO Ref. 129, p. 110)). Since the duty and commission for each of the remaining six lots could have readily been determined or approximated by Van de Graaf, it was not necessary for respondents to separately itemize the duty and commission included within the total-cost figure for each of the remaining six lots.

Fourth, along this same line, we know that respondents were taking shortcuts in the breakdown since the itemization as to the first 39-head lot lists only the initial cost, plus duty and commission (JO Ref. 127, 129, 130, p. 110). However, in the more detailed breakdown of 323 steers shown in Schaake's memorandum of Tony Seubert's telephone call, *supra* p. 50, the breakdown lists the Canadian money cost, test and feed, total Canadian money cost, the rate of exchange, the total United States dollar amount, plus trucking, duty and commission.

In addition, we know from Schaake's memorandum of Donaldson's telephone call as to the 323 steers that Donaldson was particularly interested in advising the feeder that the total cost included duty and commission (JO Ref. 31, p. 44). That is, when Mr. Donaldson telephoned Schaake's accountant on March 12, 1982, which was very close in time to the preparation of the breakdown for Van de Graaf under discussion, the memorandum of the call shows that Mr. Donaldson gave only the total, delivered cost (JO Ref. 26, 28, p. 44), and stated that "duty & .50 com [are] included" in the total cost (JO Ref. 31, p. 44).

Fifth, as shown below, in the breakdown provided by respondents for the 585-head lot, respondents showed the duty and commission separately itemized only for the first of the 12 lots comprising the 585-head lot. This, too, supports the inference which I draw that respondents included duty and commission only on the first lot shown in the breakdown of the 272 head to serve as an illustration, rather than as an indication that those items were not applicable to the remaining lots.

Finally, as stated in §§ I(B)(2) and I(C)(1), *supra*, the fact that respondents supplied the detailed breakdown (reproduced above) as to the 272-head lot is, by itself, a highly significant circumstance support-

[34] For example, the \$209.04 commission on the first 39-head lot (JO Ref. 130, p. 110) can be computed as follows: .5 x 418.07 = 209.035, which rounds to 209.04. The same result can be calculated mentally by dividing the weight (i.e., cwt) by 2, i.e., 418.07 - 2 = 209.035, which rounds to 209.04.

ing Mr. Van de Graaf's testimony that this was a commission transaction.

If this were a dealer transaction, there would have been no reason for respondents to have given Van de Graaf that detailed breakdown. The individual costs of the seven lots comprising the 272-head lot would have been entirely irrelevant to Van de Graaf. The amount of the duty paid by respondents on the first lot (or on any of the other lots) would have been entirely irrelevant to Van de Graaf. If respondents had paid a commission of $209.04 to someone else on the first lot, that fact would have been entirely irrelevant to Van de Graaf. In short, the mere fact that respondents gave such a detailed breakdown as to the seven lots comprising the 272-head lot is a highly significant circumstance supporting Mr. Van de Graaf's testimony that this was a commission transaction in which respondents were buying the livestock on a 50c per cwt commission basis.

c. Respondents' Breakdown as to the 585-Head Lot Shows that the Invoice "PRICE" Is Actually the Average Cost, and that the Average Cost Includes Respondents' 50c Per Cwt Commission.

The breakdown received from respondents as to the 11 lots comprising the 585-head lot, as it appears in the record, is reproduced on the next page (CX 32, p. 1; reduced to 74% of its original size). The pertinent information from respondents' breakdown, which I have rearranged in proper order (i.e., with the information as to 51-head lot moved from the bottom of the exhibit to the top) without any reduction in size, is reproduced on the following page, and my adding machine tapes proving mathematically and irrefutably that my rearrangement is proper are reproduced on the third page following this.

Respondents' Breakdown as to the 585-Head Lot as it Appears in Record (CX 32, p. 1)

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Calgary 3/7/82	31	25575	15830.81	61.90	MS #1
Calgary 3/7/82	49	53455	33404.86	62.44	MS #11
Calgary 3/7/82	46	52370	32257.46	61.60	MS #6
Calgary 3/7/82	45	50220	31997.83	63.71	MS #16
Calgary 3/7/82	46	50190	31846.27	63.45	Marty
Strathmore 3/7/82	142 hd	158317	100,871.69	63.72	Pis Ti
Calgary 3/9/82	13 hd	13170	8334.22	63.25	Parkland
Calgary 3/6/82	36 hd	42520	26961.58	63.40	Parkland
Brooks 3/8/82 Parkland	92 hd	97699 ave	61399.75	62.88	Park Timber
Calgary	42 hd	39885	26187.67	65.65	Marty
Total	585	638901	404,786.56		

av 63.35
av 1092

404,786.56
161,817.79
566604.35
35,820.99
255927.72
99569.06
957,921.77
800,000.00

Refund 2669.48

8652.38

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Lloyd 51 strs 55440 34,819.82 Roblane

Loaded 3/8/82 duty 599.40

Comm 277.20

35696.42 av 62.35

Respondents' Breakdown as to the 585-Head Lot Rearranged in Proper Order

Lloyd $\xrightarrow{145}$ 51 strs $\xrightarrow{146}$ 55440 Loaded 3/8/82	$\xrightarrow{147}$ 34,819,82 duty $\xrightarrow{148}$ 599.40 Comm $\xrightarrow{149}$ 277 20 $\xrightarrow{150}$ 35696,72		Robinson	64^{18}
Calgary $\xrightarrow{151}$ 21 $\xrightarrow{152}$ 25575 3/7/82	$\xrightarrow{153}$ 15830,81	61^{90}	MS #1	
Calgary $\xrightarrow{154}$ 49 $\xrightarrow{155}$ 34815 3/7/82	$\xrightarrow{156}$ 33404,86	62^{44}	MS #11	
Calgary $\xrightarrow{157}$ 46 $\xrightarrow{158}$ 52370 3/7/82	$\xrightarrow{159}$ 32257,46	61^{60}	MS #6	
Calgary $\xrightarrow{160}$ 45 $\xrightarrow{161}$ 50220 3/7/82	$\xrightarrow{162}$ 31997,83	63^{71}	MS #16	
Calgary $\xrightarrow{163}$ 46 $\xrightarrow{164}$ 50190 3/7/82	$\xrightarrow{165}$ 31846.23	63^{45}	Marty	
Strathmore $\xrightarrow{166}$ 142 hd $\xrightarrow{167}$ 158337 3/7/82	$\xrightarrow{168}$ 100,871,69	63^{70}	Pisti	
Calgary $\xrightarrow{169}$ 13 hd $\xrightarrow{170}$ 13170 3/9/82	$\xrightarrow{171}$ 8334,22	63^{25}	Parklane	
Calgary 501 $\xrightarrow{172}$ 36 hd $\xrightarrow{173}$ 42520 3/5/82	317,201,10 $\xrightarrow{174}$ 26964 58	63^{42}	Parklane	
Stocks $\xrightarrow{175}$ 92 hd $\xrightarrow{176}$ 97699 ave 3/8/82 Parklane 3/8/82 BF	$\xrightarrow{177}$ 61399 85	$62^{[illegible]}$	[illegible]	
Calgary $\xrightarrow{178}$ 42 hd $\xrightarrow{179}$ 39885	$\xrightarrow{180}$ 26187,67	63^{45}	Marty	
$\xrightarrow{181}$ Ttl $\xrightarrow{182}$ 585 $\xrightarrow{183}$ 638901	$\xrightarrow{184}$ 404,786,56			

$\xrightarrow{185}$ ave 63^{35}

$\xrightarrow{186}$ aw 1092

Adding Machine Tapes Proving Proper Order of Respondents' Breakdown as to the 585-Head Lot

No. of Head		Weight		Cost	
JO Ref.	0. *	JO Ref.	0. *	JO Ref.	0. *
145	51.00 +	146	55440.00 +	150	35696.42 +
151	21.00 +	152	25575.00 +	153	15830.81 +
154	49.00 +	155	53495.00 +	156	33404.86 +
157	46.00 +	158	52370.00 +	159	32257.46 +
160	45.00 +	161	50220.00 +	162	31997.83 +
163	48.00 +	164	50190.00 +	165	31846.27 +
166	142.00 +	167	158337.00 +	168	100871.69 +
169	13.00 +	170	13170.00 +	171	8334.22 +
172	36.00 +	173	42520.00 +	174	26961.58 +
175	92.00 +	176	97699.00 +	177	61397.75 +
178	42.00 +	179	39885.00 +	180	26187.67 +
182	585.00 *	183	638901.00 *	184	404786.56 *

Complainant's exhibit 32, p. 1, which is the first of the three pages reproduced immediately above, consists of two pieces of paper scotch-taped to a 14-inch backing sheet. The only writing that is on the backing sheet is the statement at the bottom of the page indicating that the breakdown was photocopied from Van de Graaf's records (JO Ref. 144, p. 119).

The piece of paper scotch-taped to the top of the backing sheet, which is 10 7/8 inches long, contains the breakdown as to 10 of the 11 lots comprising the 585-head lot. This top piece of paper extends from JO Ref. 138, p. 119, to JO Ref. 141, p. 119. At the bottom of this piece of paper, complainant's exhibit and page number appear (JO Ref. 139, 140, p. 119).

The small piece of paper scotch-taped to the bottom of the backing sheet, which is 2 1/8 inches long, contains the breakdown as to the 51-head lot, which is part of the 585-head lot. This small piece of paper extends from JO Ref. 142, p. 119, to JO Ref. 143, p. 119.

It is quite easy to prove mathematically and irrefutably that the small piece of paper scotch-taped to the bottom of the backing sheet originally appeared at the top of respondents' breakdown, as it appears in my rearrangement (second page reproduced immediately above).

The breakdown as originally prepared by respondents totaled 585 head (JO Ref. 182, p. 120). My adding machine tape labeled "No. of Head" shows that that total is obtained only if the 51-head lot (JO Ref. 145, p. 120) from the small sheet of paper appearing at the bottom of CX 32, p. 1, is included at the top.

Similarly, the total weight as shown on respondents' original breakdown for the 585 head totals 638,901 pounds (JO Ref. 183, p. 120). My adding machine tape labeled "Weight" shows that that total includes the 55,440 pounds (JO Ref. 146, p. 120) from the 51-head lot (JO Ref. 145, p. 120) appearing on the small sheet of paper.

Finally, the total cost to Van de Graaf, as shown on the breakdown originally prepared by respondents, is $404,786.56 (JO Ref. 184, p. 120; JO Ref. 113, p. 105). That total includes the $35,696.42 cost (JO Ref. 150, p. 120) of the 51-head lot shown on the small piece of paper.

The foregoing proves mathematically and irrefutably that the small sheet of paper containing the itemization as to the 51-head lot originally appeared at the top of the breakdown, rather than at the bottom, where it was erroneously scotch-taped on CX 32, p. 1 (JO Ref. 142, 143, p. 119). Theoretically, the itemization as to the 51-head lot could have appeared at the bottom of the breakdown immediately below the 42-head lot (JO Ref. 178, p. 120), but *before the total line* (JO Ref. 181, p. 120). However, it is quite obvious that there is no room for the information as to the 51-head lot to appear below the 42-head lot *before the total line* (JO Ref. 178, 181, p. 120) at the bottom.

Accordingly, it cannot be disputed that the information as to the 51-head lot which was scotch-taped to the bottom of the backing sheet (CX 32, p. 1) should have been scotch-taped to the top of the backing sheet. Furthermore, respondents have stipulated that the 51-head lot is part of the 585-head lot. Specifically, respondents have stipulated as to the accuracy of CX 29, pp. 1-2 (complainant's schedule of the 585-head lot), in which the 51-head lot is the *first* lot listed, and all the other lots are listed in the same sequence as they appear on respondents' breakdown (CX 32, p. 1, reproduced above) (Stipulations filed July 23, 1985, at 4, ¶ 6(a)).

Once respondents' breakdown as to the 585-head lot is rearranged in its proper order (second page reproduced immediately above), it is easy to see that it is identical in form to the breakdown as to the 272-head lot. Hence all of the discussion relating to the 272-head lot is equally applicable to, and reinforced by, the breakdown as to the 585-head lot.

Only a few of the pertinent details as to the 585-head lot will be highlighted. First, respondents' breakdown shows that the average cost of the 585-head lot is $63.35 per cwt, i.e., "ac 63.35" (JO Ref. 185, p. 120). This was determined by dividing the total cost, $404,786.56 (JO Ref. 184, p. 120), by the total weight, 638,901 pounds (or 6,389.01 cwt) (JO Ref. 183, p. 120) ($404,786.56 - 6,389.01 = $63.35). That average cost figure, $63.35 (JO Ref. 185, p. 120), is included on respondents' invoice to Van de Graaf under the heading "PRICE" (JO

for the first lot, since the origin (left-hand column of the breakdown) of each of the lots is in Canada, and the exact amount of the duty for each of the 11 lots has been stipulated (Stipulations filed July 23, 1985, at 6, ¶ 6(a); CX 29, pp. 1-2, col. 15).

For the same reasons as are set forth above with respect to the 272-head lot, I infer that the 50c per cwt commission in United States funds was respondents' commission, and that it was set forth only for the first of the 11 lots to serve as an illustration for the other 10 lots (thereby avoiding the tedious task of showing the similar breakdown as to each of the remaining 10 lots).

As stated above with respect to the 272-head lot, any commissions that respondents would have paid to others with respect to the 11 lots included in the 585-head lot would have been included in Canadian invoices, which respondents admit were paid in Canadian funds. The Canadian invoices showing the commissions paid by respondents to others in Canadian funds for all of the lots comprising the 585-head lot except for the first 51-head lot are included in the record (CX 30, pp. 4-12, 14).

The amount of commission paid by respondents to others in Canadian funds with respect to the first 51-head lot is not shown in the record since that purchase by respondents was made from Weiller & Williams (Lloyd), at Lloydminister, Canada (CX 29, p. 1, top of left-hand column labeled "ORIGIN"; CX 30, pp. 2-3), and at respondents' legal counsel's request, Weiller & Williams refused to show its records to complainant's investigators relating to respondents' purchases (Tr. 168-69).

However, Mr. Humphrey, owner and operator of Weiller & Williams, told complainant's investigator that "he was pretty sure that he charged Mike [Donaldson] a dollar per hundredweight commission for handling the cattle" (Tr. 170-71), although it could possibly have been as low as 50c per cwt (Tr. 170). In either event, respondents concede that they paid all of their Canadian invoices in Canadian money (note 21, *supra* p. 73).

For the same reasons set forth above as to the 272-head lot, respondents' breakdown as to the 585-head lot (and the fact that he gave the detailed breakdown to Van de Graaf) strongly supports Mr. Van de Graaf's testimony that respondents were buying livestock for them on a 50c per cwt commission basis.

C. Testimony of Arvid Monson, Supported by Undisputed Documentary Evidence as to Three Transactions Involving 226 Head, 144 Head and 366 Head.

1. Arvid Monson Testified Categorically that All of Donaldson's Purchases for Him in March and April 1982 Were on a 50c Per Cwt Commission Basis.

Arvid Monson entered the livestock feeding industry in 1947. He is president of Monson Ranches, a family-owned feeding company. He has also been president of Sam Cattle Company for about 10 years, which is a corporation that holds the cattle in the family's feedlots. For about 20 years, he has been vice president of Monson & Sons Cattle Company. (Tr. 358-61). Mr. Monson and his father are one-third owner (together with Schaake and Van de Graaf) of Washington Beef, Inc., a slaughtering and packing company (Tr. 289-90, 396-97).

Mr. Monson was recently on the Board of Directors of the National Cattlemen's Association for about 4 years, and he has been president of the Washington State Cattlemen's Association. He has sat on quite a few special committees, such as the National Advertising Promotional Committee, and he is the immediate past chairman of the Washington Beef Commission. He has also been the State of Washington's director on the National Livestock and Meat Board, and he is chairman of the United States Meat Export Federation. (Tr. 360-63).

Since 1980, Mr. Monson has fed over 50,000 cattle per year (Tr. 363-64).

Mr. Monson testified that since 1980, he has bought about 75% of his cattle through commission agents, order buyers. The others he purchased direct from producers by himself or through his children. (Tr. 364-65). He purchases livestock through about 10 to 12 commission buyers, including respondent Donaldson (Tr. 365-69). The commission rate is 50c per cwt for most of them, including respondent Donaldson (Tr. 367, 370-402), and varies from 35c to 50c per cwt (Tr. 367).

Mr. Monson had known respondent Donaldson since the late 1960's. Respondent Donaldson began buying livestock for Mr. Van de Graaf in about 1974. Respondent Donaldson was a commission buyer for Mr. Monson in all of the transactions with Mr. Monson. (Tr. 368-70). With respect to the transactions at issue here, Mr. Monson testified that they were all on a 50c per cwt commission basis. He testified (Tr. 370-71, 380-86, 390-91, 399, 400-02):

Q. Do you recall transactions which occurred in March and April of 1982 when you received cattle out of Canada from Mr. Donaldson?

A. Yes, I do.

Q. Do you recall how those transactions came about?

. . . .

A. Yes. Dick Van de Graaf and I happened to be up in Lewiston during heifer week which was probably the mid-February. We were sitting in the cafe having dinner after the sale and Mike [Donaldson] and his wife were there. We just started discussing about the availability of cattle. He thought

there would be some opportunities to go into Alberta for what we call warmed-up cattle. So Dick and I both said, "Fine, go up there and see what you can find."

Q. What was the agreement for those cattle?

A. The agreement was always understood that it was a commission basis.

. . . .

Q. Mr. Monson, you may disregard page 1 of that exhibit [CX 11, which includes 144 head involved in this proceeding] and instead turn to page 2, if you would. What I would like you to do is go through the various pages in these exhibits and just tell us what these documents are, what they show?

A. Well, these are documents that Mike sent out to us on cattle that he purchased up in Alberta. It is for certain weights and buying, you know, commission services.

. . . .

Q. I believe we have touched upon this, Mr. Monson, but I would like to ask you, you have testified that you purchased virtually all of your livestock through either commission agents or yourself. Why don't you purchase more livestock through speculators, through livestock dealers?

A. Because we feel like, you know, of our, I guess time in the industry, that we feel like we have to eliminate that type of stuff in the business. It is not a good way of doing business.

Q. Why not?

A. Well, why should I go out and give a guy 2 or $300 mark up for just driving out to somebody's ranch and stumbling on to some cattle? I am not going to be a survivor. I am not going to be a viable part of this industry, I am not going to be involved in the industry if I do stupid business like that.

Q. Were you ever approached by Mr. Donaldson for him to purchase on the speculative basis for you?

A. No.

A. The actual scale tickets less the rate.

Q. Less what pencil shrink he said?

A. Whatever is established at the time of purchase.

Q. When you purchase livestock on a commission basis through an order buyer, at what price should he be accounting to?

. . . .

A. What purchase price should he be accounting? What he paid for them.

Q. Thank you. You base those last two answers on what?

A. On 25, 30 years of practical experience out there in the field everyday buying cattle, buying 50,000 head of cattle a year.

Q. You have testified just now that an order buyer should be sending you scale tickets and all the accountings he received. Were you sent such documents in this case in these transactions by Mr. Donaldson?

A. No, sir.

Q. Why not?

A. He could never provide them. We asked him, I asked him in many, many conversations with the gentleman and he never would. He would come up with some type of excuse. That particular phone call why he couldn't get them to us, he told us the bookkeeper was going to get them to us and they never arrived. [38]

. . . .

Q. You have also testified, I believe, that Mr. Monson, Mr. Schaake and Mr. Van de Graaf did ask you for purchase documents for livestock such as scale tickets, but that your copy of the scale tickets was sent with the Customs documents to the border. That's basically a correct summation?

A. Yes.

e that they also asked you for documentation tickets?

is, the way that it all happened, after I was done in Canada, I was in California. Two to three weeks after

---

hat Mr, Monson, Mr. Schaake and Mr. Van
ocuments such as scale tickets. He testified

Mr. Van de Graaf had received the last shipment of cattle from me, they called me up and wanted documents.

CROSS-EXAMINATION

QUESTIONS BY MR. MILLER:

. . . .

Q. Now, as I recall your testimony, you indicated that Mike [Donaldson] thought there were cattle available in Canada and it generally sounded attractive to you so you in effect authorized Mike to start looking around. Would that be a fair statement?

A. That would be a correct statement.

Q. Now, at that meeting when this project was conceived, was there ever a specific mention of 50 cents commission?

A. Yes.

Q. Now, the people present would be who?

A. People present in this conversation?

Q. Yes.

A. Mike and I over the telephone.

Q. I was directing your attention to this meeting at Lewiston.

A. It was in a bar at 1:00 in the morning. He says, "I want to go to Canada." We said, "Go ahead and go Mike." We are not going to stand there and go through the conditions of what we are going to do up there. It was understood. He had bought cattle for both of us in the past.

Q. The answer to the question, though, it would be no? It was not specifically discussed at that time; is that correct?

A. No, not to my recollection.

. . . .

Q. So in any event, your understanding of the transaction would be that at the time the advance was made Mike either had bought or was in a position to buy these livestock?

A. He was right in the transaction of buying them.

Q. So he would either have bought them or was negotiating to buy them?

A. That is correct.

Q. If he had already bought them, you wouldn't necessarily at that time know for how long he had owned them or how long he had contracted or arranged for their purchase?

A. He communicated with us almost daily, if not daily, sometimes two or three times a day. He would say, "I am on this set of cattle; they can be bought for "X" amount of funds, but I need the funds." He would compute it back to Canadian funds right at my desk. We would say, "Go ahead and buy them," or, "Do not buy them."

. . . .

THE COURT: The 1981 transactions, the ones where Mike [Donaldson] bought cattle for you prior to the transactions in the spring of '82, were they commission deals or buying deals or did you buy from him as a dealer at that time on a speculative basis?

THE WITNESS: Mike never took a speculative position when he bought cattle for us. It was always understood when he bought the cattle, five minutes later he would call me and present to me the conditions that he bought them under. It was strictly a commission basis.

. . . .

THE COURT: How did he [Donaldson] get paid his commissions, though?

THE WITNESS: Can I give you an example? In August '81 Mike [Donaldson] called and said, "I have got some cattle in Billings, Montana that I can buy." So I said, "Well, let's run over and look at them." We jumped in his airplane and flew over to Billings and bought the cattle for 55 cents. I was there with him and bought the cattle. I said, "Okay, let's get the trucking lined up." He said, "Why don't you let me take care of the trucking. I will just put my commission right in the trucking and deliver the cattle to you with freight, commission for 275 a hundredweight."

he sends the cattle. The first 700 of them were fine. The [illegible] of them he took I don't know how many hundred [illegible] weight he took from me because the cattle shrank [illegible] percent from the weights that he told me they

THE WITNESS: In that particular case.

REDIRECT EXAMINATION

QUESTIONS BY MR. HOCHBERG.

Q. Mr. Monson, approximately when was the telephone conversation you referred to in which Mike Donaldson stated -- in which the two of you specifically discussed a 50 cents commission?

A. In the Canadian transaction?

Q. Yes.

A. It absolutely was understood. In exact conversation I can't remember.

As quoted above, Mr. Monson testified that "when this project was conceived" (Tr. 385), i.e., in mid-February 1982 (Tr. 370), there was "a specific mention of 50 cents commission" between "Mike [Donaldson] and I over the telephone" (Tr. 385). Although Mr. Monson could not remember the "exact conversation" (Tr. 401-02), that does not detract from his categorical testimony as to the nature of his agreement with Mr. Donaldson. Mr. Monson testified on July 24, 1985, almost 3| years after the telephone conversation occurred. It is not at all surprising that he was unable to recall the exact conversation which, at the time, was a routine business conversation. In fact, his admission that he was unable to remember the "exact conversation" adds to his credibility.

As stated at the outset, Mr. Monson is an eminently qualified livestock marketing expert. The ALJ believed his testimony that his agreement with Mike Donaldson was for Mr. Donaldson to buy the livestock involved in this case on a 50c per cwt commission basis. And, as shown in the following subsection, undisputed documentary evidence supports Mr. Monson's testimony as to some of the transactions. I affirm the ALJ's findings and conclusions as to all of respondents' purchases for Monson.

2. Undisputed Documentary Evidence Supports Mr. Monson's Testimony as to Three Transactions Involving 226 Head, 144 Head and 366 Head.

The documentary evidence referred to in this subsection is not nearly as strong as that referred to in § I as to Schaake or § II as to Van de Graaf. It is, nonetheless, quite significant--significant enough to be regarded as a "smoking gun."

Here, as in the case of the invoices to Schaake and Van de Graaf discussed in §§ I(C)(2) and II(B)(2)(a)-(c), the figures under the heading "PRICE" in the three transactions discussed here are not really the price of the animals. Rather, they are the average cost.

The actual products (results) obtained by multiplying each "WEIGHT" by the "PRICE" shown on the invoices, and the difference

in each case between the actual product (result) and the "AMOUNT" shown on respondents' invoices are set forth on the following two pages, which reproduce the invoices off-center so that two additional columns can be added at the right, showing the actual product (result) of the "WEIGHT" times the "PRICE," and the difference between the actual amount and the "AMOUNT" as shown on respondents' invoices.

<u>Respondents' Invoice to Monson for 144 Head and 366 Head (CX 11, p. 2; CX 15, p. 2)</u>

INVOICE
MIKE DONALDSON
SPENCER LIVESTOCK COMMISSION COMPANY
P O Box 1222
Lewiston, Idaho 83501 DATE: 3-15-82

Sold To Monson & Son
Rt 3 - Box 3330
Sunnyside, WA 98944

NO. HEAD	KIND	AVE. WT		WEIGHT	PRICE	AMOUNT	Actual Amount of Weight Times Price	Difference
144	strs	1060		152605	64.76	98824.50	$ 98,827.00	$ 2.50
	1-	[illegible],		2 - [illegible]				
366	hfrs	826		302457	60.40	182705.21	182,684.02	21.19
	1-	[illegible],	4-	[illegible],		1-[illegible]		
	- All	[illegible] -						
				TOTAL				

Respondents' Invoice to Monson for 226 Head (CX 19, p. 5)

INVOICE
MIKE DONALDSON
SPENCER L'VESTOCK COMMISSION COMPANY
P O Box 1222
Lewiston, Idaho 83501

DATE: 4-6-82

To Monson & Son Cattle
Rt 3 - Box 3330
Sunnyside, WA 98944

NO HEAD	KIND	AVE. WT		WEIGHT	PRICE	AMOUNT	Actual Amount of Weight Times Price	Difference
226	Strs	684		154567	6061	9368962	$ 93,683.06	$ 6.56
110 →				191 →				
					DP	< 90000 ->		
	- Sold	Advanced		on				
		3 -	Pickland	-		368962		

TOTAL

The 144-head lot shown on the invoice (JO Ref. 187, p. 134) relates to Finding 3, *supra* (under the heading "A. Transactions with Sam Cattle Co. and Monson & Sons Cattle Co."); the 366-head lot (JO Ref. 189, p. 134) relates to the 48 head and 318 head (48 + 318 = 366) referred to in Findings 4 and 5 under the same heading; and the 226-head lot (JO Ref. 190, p. 135) relates to Finding 7 under the same heading.

As previously stated in connection with the discussion as to similar invoices sent by respondents to Schaake and Van de Graaf, if these were dealer transactions, in which respondents were selling livestock to Monson on a dealer basis at a price agreed upon by the parties, the agreed-upon prices would be set forth on the invoices, i.e., in each case, the "WEIGHT" multiplied by the "PRICE" would equal the invoice "AMOUNT." *Here, it does not!!!!* This proves conclusively that the figures under the heading "PRICE" are not really a dealer's price agreed upon by the parties for the livestock. This is significant evidence supporting Mr. Monson's testimony that respondents were buying livestock for Monson on a commission basis.

As a matter of fact, as to the five transactions in this case involving Monson, there is only one of respondents' invoices in which the "WEIGHT" multiplied by the "PRICE" equals the "AMOUNT" on the invoice, *viz.*, respondents' invoice to Monson for 75 head at a "WEIGHT" of 54,150 pounds (or 541.50 cwt), a "PRICE" of $60.64 per cwt, and an "AMOUNT" of $32,836.56 (CX 19, p. 4) (541.50 x $60.64 = $32,836.56). This invoice strongly indicates an agency transaction because of the "odd" price, i.e., $60.64 per cwt (§ IV, *infra*).

Accordingly, all of respondents' invoices to Monson strongly support Mr. Monson's testimony that the transactions involved here were all commission transactions.

III. <u>The Advances of Hundreds of Thousands of Dollars by the Feeders to Respondents Is Strong Evidence of an Agency Relationship</u>.

Immediately before (and during) the time that respondents were buying livestock for Monson, Van de Graaf, and Schaake, the feeders advanced hundreds of thousands of dollars to respondents, constituting from 64% to 94% of the total cost of the livestock. The advances are set forth in the following table.

Advances by Feeders to Respondents for Livestock Purchases

Feeder	Amount of Invoice	Record Ref	Amount of Advance	Record Ref.	Advance as Percentage of Invoice Amt.
Monson	$ 98,824.50	CX 11, p.2			
Monson	182,705.21	CX 11, p.2			
	281,529.71		180,000	CX 11, p.1, 4	64%
Monson	32,836.56	CX 19, p.4			
Monson	93,689.62	CX 19, p.5			
	126,526.18		90,000	CX 19, p.1, 2	61%
Van de Graaf	957,921.97	CX 28, p.3	800,000	CX 28, p.3-5	84%
Van de Graaf	164,419.72	CX 72, p.3	150,000	CX 72, p.3-4	91%
Schaake	226,571.15	CX 44, p.1	180,000	CX 44, p.1-4	79%
Schaake	264,868.66	CX 56, p.1-2	250,000	CX 56, p.2-3	94%

Those large advances by the feeders to respondents constitute persuasive evidence supporting the testimony of the feeders that these were agency transactions. In *Valley View Cattle Co.* v. *Iowa Beef Processors, Inc.*, 548 F.2d 1219, 1220-24 (5th Cir.), *cert. denied*, 434 U.S. 855 (1977), the court held that the evidence was sufficient to support the jury's finding that a bankrupt livestock buyer (Heller) purchased the cattle in question as an agent of the packer (IBP). The court held that the "most persuasive evidence to us [in support of the jury's agency finding] is the combination of advances by IBP and delayed payments by Heller (Heller often paid later than the period prescribed by the Packers & Stockyards Act), so that in effect cattle bought by Heller were being paid for by IBP's funds channeled through Heller's bank account" (548 F.2d at 1224). The advances in *Valley View* are described as follows (548 F.2d at 1223):

> IBP regularly advanced to Heller, at his request, a large portion of the estimated dressed price of the cattle, and in the instant transaction advanced 90%. In the early stages of their dealings Heller did not ask for advances, but as time passed his requests became more and more frequent. Heller could not recall a request for an advance being denied or altered in any way. Redd testified that advancing in this manner was an uncommon practice, not generally available to a dealer.

Similarly, in *Lubbock Feed Lots, Inc.* v. *Iowa Beef Processors, Inc.*, 630 F.2d 250, 254-77 (5th Cir. 1980), involving the same general factual situation as was involved in *Valley View*, *supra*, the court similarly held that there was sufficient evidence to support the finding of another jury that Heller acted as the agent of IBP in the purchases in controversy. Again, the court relied on the fact that "Heller received large

advances from IBP, an unusual practice between packers and independent cattle buyers" (630 F.2d at 270).[37]

Mr. Keith M. Kienow, complainant's chief investigator in this case (Tr. 89), testified that the fact that the feeders gave the large advances to respondents is one of the primary indications that Mr. Donaldson was buying for them on an agency basis (Tr. 517–19). Mr. Kienow is an eminently qualified livestock marketing expert. He has a Bachelor of Science degree in Animal Science from South Dakota State University. He has been in a supervisory position with the Packers and Stockyards Administration since 1970 (Tr. 85–88). Before he joined the Packers and Stockyards Administration, he was a USDA market news reporter (Tr. 88). He was first assigned to complainant's Indianapolis regional office as a marketing specialist, and, later (from 1970 to 1980), he was the supervisory marketing specialist in complainant's Portland office. From 1980 to 1983, he was Assistant Regional Supervisor of complainant's Portland office, and since September 1983, he has been Regional Supervisor of complainant's Omaha office. (Tr. 85–89). Mr. Kienow testified (Tr. 517–19):

> A. . . . The transactions, like I said earlier, do have earmarks of an agency and the price. My investigative experience tells me that the price relating to per hundredweight [i.e., the "odd" prices such as $60.64 per cwt] indicates that there was agency.
>
> Also, the advancing of money would indicate that there was a relationship between Monson and Van de Graaf.
>
> Q. From your own independent background and experience and all of that, you think that the price in [and] advance features of these transactions point toward agency?
>
> A. In addition to the understanding of the principals.
>
> Q. Well, aside from the price and the advance features, the only other information you have which leads you to say that Donaldson was working as an agent on a commission is what Mr. Monson, Mr. Van de Graaf and Mr. Donaldson told you?
>
> A. That is true.
>
> Q. Aside from these prices in [and] advance feature, your assertion that Mr. Donaldson was working as an agent was

[37] In *Rufenacht v. Iowa Beef Processors, Inc.*, 656 F.2d 198 (5th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982), and *Brumley Estate v. Iowa Beef Processors, Inc.*, 704 F.2d 1351, 1355, 1362 (5th Cir. 1983), 715 F.2d 996 (5th Cir. 1983), *cert. denied*, 465 U.S. 1028 (1984), involving similar, but not identical, facts with respect to Heller and IBP, the court upheld verdicts by a judge and a jury, respectively, that Heller was not IBP's agent. The cases discuss issues such as collateral estoppel and the applicability of a Texas statute rather than the factors indicating agency or dealer arrangements.

based on the fact that you believe the Complainants rather than Mr. Donaldson?

A. Based on my experience in the examination of these documents and the interviewing with the feeders, that is correct.

Q. You said based on your experience the only two things that are in these documents that make you think they are commission deals is the price and advance ledger, right?

. . . .

THE WITNESS: Those would be the primary two things.

The three feeders involved in this proceeding testified that they would not have advanced funds to a dealer selling livestock to them on a speculative basis. They advanced money to respondents, acting as an agent, because respondents did not have sufficient funds of their own to buy the livestock, and by advancing large blocks of money to respondents, respondents could transfer the American funds to Canadian funds at a better exchange rate, thereby lowering the feeders' costs. Mr. Monson testified (Tr. 372-73, 391-92):

Q. Please open to page 4 of this exhibit [CX 11, which includes 144 head]. Can you state for the record why you made this partial payment of money [$180,000]?

A. In a telephone conversation with Mike [Donaldson] he said if we could send up large blocks of money that he could transfer it from American funds to Canadian funds at a better exchange rate, then we would ultimately reduce our costs.

Q. When you say "we", who are you including in that?

A. Schaake and Van de Graaf. All three of us were very well aware that Mike was buying cattle for all of us at the same time.

Q. You have stated with respect to page 2 that this was a commission deal. I would like to ask you, under what circumstances would you advance an amount of $180,000 to a person who was buying and selling livestock for his own speculative account?

A. That would be an absolute unheard of business decision. I would never make a business decision like that.

Q. Why would that be?

A. The only reason that I would have reason to advance him is to better my price that we would ultimately pay for these cattle. I wouldn't advance money to an agent that wanted to resell the cattle to me.

. . . .

Q. Do you recall a specific phone conversation with respect to this transaction reflected by Exhibit 11, page 4 [$180,000 advance]?

A. You bet.

Q. Pardon?

A. Yes.

Q. You recall the specific conversation?

A. Yes.

Q. What was that?

A. Well, Mike [Donaldson] said that if we could send up or if I could send up larger amounts of money that he could exchange the American funds into Canadian funds and do a better job of negotiating with the Canadians on transfer of funds. He said, "If I have to do it load by load I don't have any leverage and I can pass that savings on to you." So I said, "Well, it is not our standard procedure to do that Mike, but under the conditions I will go along with that."

Similarly, Mr. Van de Graaf testified (Tr. 296, 320–21; and see Tr. 342–43):

Q. Why did you advance him money?

A. Because he needed it for his -- he needed, said he needed the money. He didn't have any money to pay for those cattle and he needed money to put in the Canadian banks.

. . . .

Q. Mr. Van de Graaf, under what circumstances would you advance money to someone who is purchasing for you on a speculative -- who was selling to you on a speculative basis?

A. We wouldn't do it. If he was speculating, we wouldn't do that.

Q. Why not?

A. Because that is just poor business. We don't do that. Only reason we would do that would be so he would have funds to buy the cattle and charge -- we pay him the commission, so he will have funds to pay for the cattle.

Finally, Mr. Schaake testified (Tr. 273–74):

Q. Looking at Exhibit 56, page 3?

A. Yes.

Q. It looks like the down payment for the cattle was made on 3–26.

A. Yes. Now, as I recall this, Mike [Donaldson] would buy Canadian money. He would try to buy it the day he bought the cattle so that we knew what our cost was and because if you

> waited until the day you received the cattle, the weight [rate] could have changed. I didn't want to gamble the cattle would cost more. That is the reason for the, as I recall, for the advances, that he was tying up his money in advance of receiving the cattle and he didn't have a bank account.

Respondents' purported expert witness, Mr. John Frye, a certified public accountant with a large livestock-industry business, expressed the opinion that the large advances strengthened his opinion that these were dealer transactions. He stated that a feeder would make an advance to a dealer in times of short supply as an inducement (bribe) to keep the dealer selling livestock to him. Mr. Frye testified (Tr. 590-92, 685-86):

> Q. Let's take a look at Exhibit 11, page 4, which generally indicates the existence of a -- it says here a partial payment on cattle in this transaction. Do you have an opinion as to whether or not the existence of a partial or prepayment would be inconsistent with your analysis indicating this is a dealer transaction?
>
> A. The partial payment in Exhibit 11, 4, would strengthen my opinion that this is a dealer transaction. My basis for that is when partial payments are made for transactions or down payments, whatever they are called or referred to in the cattle industry, in this case Monson & Son were going to make that partial payment, I would conclude that they would want to make it from who they are buying the cattle from.
>
> If it was an agency transaction, they would want that to go to the owner of the cattle; and if it was also a dealer, they want that same thing, and here is why: they want to tie up the cattle so that they get delivery of the numbers they are expecting and at the price they want. If you are buying from the grower or the rancher, you want to give him some money and say that you are buying them at this price because you are probably turning down other cattle offered to you.

> ing the advance that the cattle will keep coming. That feed lot needs numbers in it and it needs to be engaged to animals. So he makes that advance to force the man who receives the advance to keep the cattle coming, as the cattle people say, because if he doesn't, the dealer then may stop the shipments, and I don't mean being ornery about it. I mean that if there's another hundred head of same type of cattle, that he will send them to someone else, particularly if the market is strong at that time, so that one keeps sending him the money so the cattle keep coming so nobody else gets them.
>
> I think I testified yesterday that of your expected shipment of certain head counts, you may have turned down business from other people. You need those deliveries so then you're not out screwing around to try and get the numbers of what you need to carry on your business.
>
> That I believe is the type of consideration that maybe you and I would use if we're making an offer on a house, like a down payment. So, he is trying to guarantee his quality, quantity, and his price by making those payments.
>
> The receiver of the money is hooked on to keep the same numbers that are expected, the same quality, and at the same price.

Mr. Frye's views are contrary to those of complainant's expert witness, the three feeders involved in this case (each an expert witness), and the cases discussed above. It is a view that demonstrates Mr. Frye's lack of expertise in the field of livestock marketing (without deprecating his expertise as a certified public accountant). In our capitalistic livestock industry, the *price* that the buyer is willing to pay for livestock is the allocator of scarce supplies--not bribes paid to the seller. Mr. Frye's view is "of the stuff that dreams are made of" (*Jenkins* v. *Smith*, 21 F. Supp. 251, 253 (D. Conn. 1937), paraphrasing Shakespeare, *The Tempest*, Act IV, sc. 1, line 148).

As the expert feeder witnesses indicated, it would have been foolhardy for them to have advanced hundreds of thousands of dollars to a dealer in advance of delivery or even purchase by the dealer. If such advances were made to a dealer who went bankrupt, the feeders would have very poor recovery prospects. Although there was also risk involved in advancing money to an agent, the money advanced for the specific purpose of buying livestock would have been trust funds, perhaps giving the feeders some measure of protection in the case of the agent's bankruptcy. See 9 Am. Jur. 2d *Bankruptcy* < 261 (1980). In addition, the risk incurred in advancing money to their agent was worthwhile since it lessened the agent's costs, which were passed on to the feeders.

For the foregoing reasons, here as in *Valley View* and *Lubbock Feed Lots*, *supra*, the large advances made by the feeders to respondents is

very persuasive evidence supporting the feeders' testimony that respondents acted as their agent in buying livestock.

IV. Respondents' Pricing of Livestock in "Odd" Amounts, e.g., $60.64 Per Cwt, Is Strong Evidence of an Agency Relationship.

In four of the 17 transactions involved in this case, respondents priced the livestock in "odd" amounts, *viz.*, *$60.64* per cwt for 75 heifers to Monson (CX 19, p. 4; Stipulations filed July 23, 1985, at 2, ¶ 2(d)); *$60.04* per cwt for 102 heifers out of a total of 172 heifers to Schaake (CX 56, p. 2; Stipulations filed July 23, 1985, at 8, ¶ 11(d)); *$65.76* for 277 steers to Schaake (CX 64, p. 2; Stipulations filed July 23, 1985, at 10, ¶ 13(d)); and *$59.48* per cwt for 217 heifers to Schaake (CX 68, p. 3; Stipulations filed July 23, 1985, at 10, ¶ 14(d)).

In the four transactions just listed, respondents' price is the true price of the livestock, i.e., when you multiply the "WEIGHT" by the "PRICE," the product ("AMOUNT") is the exact amount invoiced to the feeders. (There is only one other transaction involved in this case in which the "PRICE" set forth on the invoice is a true price, *viz.*, the 310 steers to Van de Graaf invoiced at an "even" price of $65.80 per cwt (CX 72, p. 3)).

Although there are numerous "odd" prices in the record, the "odd" prices other than the four listed above are actually average-cost figures, rather than true price figures. Some of the "odd-price" figures in transactions involved in this case that are actually average-cost figures, rather than true price figures, are set forth above on the off-centered invoices, *viz.*, JO Ref. 4, 8, p. 82; JO Ref. 117, p. 108; JO Ref. 188, p. 134; JO Ref. 191, p. 135.

The other "odd-price" figures in transactions involved in this case that are actually average-cost figures, rather than true price figures, are as follows: $60.94 per cwt for 98 head to Van de Graaf (CX 36, p. 3; Stipulations filed July 23, 1985, at 5, ¶ 7(d)); $62.29 per cwt for 116 head to Van de Graaf (which together with 106 head for which the "PRICE," i.e., the average cost, is an "even" amount ($66.10) constitute the 222 head involved in this proceeding) (CX 40, p. 3; Stipulations filed July 23, 1985, at 6, ¶ 8(d)); and $65.76 for 73 head to Schaake (CX 60, p. 2; Stipulations filed July 23, 1985, at 9, ¶ 12(d)). (As shown above in §§ I(C)(2) and II(B)(2)(a)-(c), the fact that respondents failed to show a true price figure on their invoices in these transactions shows that they were not dealer transactions in which respondents were selling the livestock as a dealer at an agreed-upon price.)

As the ALJ stated, the "record shows that as a practical matter dealers just don't price their livestock at ["odd" prices such as] $60.46 or $64.86" (Initial Decision at 30). Dealers price their livestock at prices in which the cents-figure is a multiple of five, e.g., $60.10, $60.25.

Mr. Kienow, complainant's expert witness, testified that respondents' pricing of the livestock in "odd" amounts and the large advances by the dealers to respondents were the two primary factors (along with the statements of the feeders) that indicated an agency relationship between respondents and the feeders (§ III, *supra*).

Mr. Van de Graaf testified that a dealer never prices livestock in an "odd" amount. He testified (Tr. 315):

> Q. My question to you is, if this was a transaction where you were purchasing livestock from a speculator, and I realize that you do not commonly, you do not ordinarily purchase from speculators, if this was a transaction where you were purchasing from a speculator, would you expect to see a price of $60.94? Does that look like a price that a speculator would have?
>
> A. No.
>
> Q. Why not?
>
> A. A speculator, if he says he is going to sell you cattle, it would be, let's say, 61 cents or maybe 60.75 or 60.50. It is a even number; it is never an average number like that.

Similarly, Mr. Monson testified that dealers never price livestock in an "odd" amount. He testified (Tr. 373-74, 403, 405-06):

> Q. If you would also take a look on Complainant's Exhibit 11, page 6?
>
> A. Page 6?
>
> Q. Yes. Under the price column, what do those prices, $60.41, $64.76, tell you about the nature of this transaction?
>
> A. That it was a commissioned transaction.
>
> Q. Why would that be?
>
> Well, I would never buy, I have never in my life ever t a set of cattle from anybody on a delivered basis at l. It is either 60-1/4 or 60-1/2. Nobody breaks it off to ny. This indicates very clearly without a question of a hat it is a commission transaction.
>
> . .
>
> would never buy cattle from anybody, anybody, 0.49 without it being a commission purchase.
>
> you believed this to be a commis- ay the price is stated, that is it is

. . . .

> Q. Mr. Monson, can you remember purchasing livestock from a speculator who assumed or was responsible for the cost of trucking and who invoiced you on an uneven amount such as the amounts shown on these invoices?
>
> A. Never. Never to my knowledge have I ever seen anything like this on a prospective basis, speculative basis.

Mr. Schaake testified in a similar manner as to "odd" prices. He testified (Tr. 227):

> Q. You have testified that this was a commission transaction. Would you expect to find a price like that, 64.86, if this was a transaction which Mr. Donaldson was speculating, buying and selling for his own account?
>
> A. No, I wouldn't.
>
> Q. Why not?
>
> A. Well, I believe if I bought cattle from Mike [Donaldson], which I bought cattle that way, he calls me and he has cattle to sell. I don't think he has ever priced them at an odd figure like that. I presume he would have assumed those cattle at 65-1/2, 64-1/2, \$.65, an even figure.

Respondents' purported expert witness, Mr. Frye, testified to the contrary. He testified (Tr. 596-99):

> Q. Also looking at Exhibit 11, 8, we see there the prices for the cattle. That is with respect to the 65 heifers, \$60.40 [\$60.41 on CX 11, p. 8] and with respect to the steers, \$64.76. Do you have an opinion as to whether that unevenness of the cents in the price column reflects orders or reflects the existence of a dealer transaction?
>
> A. I have an opinion. The uneven dollars in that price that you mentioned would lead me to believe that this is a dealer transaction, not an agency transaction.
>
> Q. Why is that?
>
> A. When I talk to my livestock clients and ask them how the market is, they say that the price is fifty-nine, sixty-one, fifty-eight, and they quote those as hundredweight, and they are talking the whole dollars.
>
> When they go to the stockyard facility, the auctioneer does not ask for the pennies or the dimes or the nine cents. He wants a quarter up. When the farmers and ranchers read the quotation in the paper daily, the Omaha, it says it is 50 cents higher to a dollar, it is 2 lower, steady, or unsteady; but they are quoting them as even.
>
> Therefore, I think that the man raising the livestock is thinking of whole dollars. If I have an agency transaction in my example of the 59 cents, then an agency transaction will charge a commission based on one hundredweight.

The 59 cents is that way. If he is charging 59 cents a hundred or 39 cents a hundred, that still makes it even.

So, the agent would buy. The rancher pays the 59 and I would make a 59-1/4 or 59.75.

With that commission being added on to it, it will keep it in whole dollars. The dealer, however, is still thinking that way and he is still dealing with the farmer and he is thinking of whole dollars.

When the agent bought the cattle, the only expense that he has is probably none. He has bought them and he has his commission.

The dealer is going to have to pay the brand inspection. Where the principal of the agent is going to pay that, the dealer is going to have to pay some trucking and help in some branding or whatever, so he is now getting some funny costs in there.

He has got a $209 freight bill and $13.50 brand or whatever. So, now, his costs aren't there. He could have bought them at fifty-nine, the same as the agency man.

Now, he has got to be paid for those. When the agent buys it, the weight is the same as when the dealer buys. The head count is the same and the kind of animals are the same. The only thing, then, that can be changed by the dealer to get those costs -- you only sell the weight. You sell the same head count, same kind. You get those count.

Then, the price has to come up or down. That is what makes the game, because the trucking is not by weight. It is by miles. The miscellaneous other expenses are by head count.

He puts them in somewhere by feed. It is a dollar, dollar and a half per head. That is not hundredweight.

Therefore, his price is not going to be even anymore. Dealers' prices aren't even. Agency prices are.

This, again, shows Mr. Frye's lack of expertise as a livestock marketing specialist. It is true that a dealer's *costs* would be in "odd" amounts. But it is the universal practice in the United States for dealers to *price* their livestock in even amounts. Dealers are free to charge what the traffic will bear for livestock. As complainant's expert witnesses testified, dealers just do not price livestock in "odd" amounts. The "odd" prices stated by respondents as to the four transactions listed at the outset of this section are strongly indicative of commission transactions.

With respect to Mr. Frye's view that commission transactions would be priced in even amounts (i.e., to the nearest 5c), it is true (as Mr. Frye testified) that a commission buyer would buy livestock in even prices, and his commission would be in an even amount. Accordingly,

the resulting invoice from the agent to the principal would be in an even amount *if the principal paid the other costs separately, such as for freight, feed, etc.* But where the commission buyer paid the freight, etc., and passed those costs on to the principals, it is obvious that the costs to the principals would generally be in "odd" amounts.

It is undisputed that respondents paid the freight and other incidental expenses in the transactions involved here and passed those costs along to the principals (see, e.g., the Table, *supra* p. 70, showing respondents' stipulated expenses). Mr. Schaake testified (Tr. 248–49):

> Mike [Donaldson] is practically the only order buyer we purchase from that pays expenses. Within the States, the only expense you have on the cattle besides the cost of the cattle themselves is the freight. They do not have -- why pay the freight bills ourselves? Mike, most of the cattle he buys, it saves in our bookkeeping and our accounting, he pays the hauling. From California he will pay the hauling, then bill us at a price which includes his commission and the hauling.

Since respondents paid the freight, feed, and other costs, and passed those costs along to the feeders, one would normally expect the price in their commission transactions to be in "odd" amounts, e.g., $60.64 per cwt. The odd prices here in the four transactions listed at the outset of this subsection are strongly indicative of an agency arrangement.

V. An Order Buyer's Commission Is Not Separately Stated (but Is Included in the Delivered Cost to the Principal) in About Half of the Livestock Commission Transactions.

The fact that respondents' commission was not separately stated on the invoices to Schaake, Monson and Van de Graaf is not a circumstance detracting in any manner from the strong evidence set forth above proving that the 17 transactions involved here were commission transactions in which respondents were buying for the feeders on a 50c per cwt commission basis. Mr. Kienow, complainant's expert witness, testified that the commission is not separately stated, but, rather, is included as part of the delivered price, in about half the livestock transactions. He testified (Tr. 474–75, 482–84):

> A. I draw your attention to [CX 52,] page 1. It shows Calgary, 144 steers. It shows a weight, price per hundredweight that Donaldson invoiced Schaake. It is $61.14.
>
> Q. Is that $61.14?
>
> A. Excuse me. It is $64.14 per hundredweight [JO Ref. 4, pp. 40, 82]. The purchase amount including the expenses incidental to the purchase of those cattle should have been sixty-three -- let's see. Fifty cents less than that would be $63.74 [actually $63.64], if my math would be correct, would be the purchase amount; and the 50 cents a hundred commission would make the $64.14.
>
> Q. In your experience as an investigator and an assistant regional supervisor and also a regional supervisor in the various

regions which you have testified you have administered, how common is it to have a commission transaction accounted for in this manner where the commission is not separately stated?

A. It probably occurs 50 percent of the time.

Q. Specifically with respect to your duties when you're in the Portland regional office, how common is it to have a commission transaction accounted for in this manner where the commission is not separately stated?

A. It probably occurs 50 percent of the time.

. . . .

Q. In these transactions that you have tabulated and included documentation for, who initially pays for the livestock being purchased?

A. Mike Donaldson.

Q. Then what is the payment that the buyers give to Donaldson? What would those payments include?

A. Those payments would include the amount that Mike paid to the person from whom he received the livestock, the freight, the tests, the incidental expenses, the duty.

. . . .

Q. When Mr. Donaldson receives those payments from the buyers, what should those payments include?

A. His commission.

Q. What else should they include?

A. The purchase price of the livestock and the expenses in getting those livestock from Canada into the U.S.

Q. Basically the items that you tabulated on your schedules?

A. That would be true.

Q. Those types of expenses?

A. That's true.

Similarly, Mr. Monson, who purchases livestock through about 10 to 12 commission buyers (Tr. 365–69), testified that the commission is a separate entry on the accountings on 50% or less of the accountings he receives. He testified (Tr. 383):

Q. For this next question I would like you to use the time frame of 1980 through the present time, if you are able to. My question to you is: when you purchase, you meaning Monson and Sons, Sam Cattle Company and your present farm, pur-

chase livestock on a commission basis from an order buyer, how often is the commission a separate entry on the accountings which you receive?

A. Probably 50 percent or less.

Similarly, Mr. Schaake, who purchases livestock through about 10 to 12 commission buyers (Tr. 210-14), testified that there are various ways in which the commission is paid, and that a "big share of the time they are not" separately stated on the invoices (Tr. 268). He testified (Tr. 247-49, 250-51, 268-69):

> Q. When you purchase livestock on a commission basis through these order buyers or agents, how often is the commission included in the price per hundred weight for the cattle in the accounting to you?
>
> A. We do that various ways. We have a man who probably buys more cattle on that basis than anybody, Clarence Johnson. Clarence pays for the cattle with our draft. Once a month we pay him his commission. We keep track of the commissions as we go along. Once a month we pay him. Some of them -- I have one -- we have one that works out of Billings, Montana. He will pay for the cattle with our draft and he will draw another draft on us for his commission. If they use our draft to pay for the cattle, then, of course, they cannot add the commission to it because then that draft is going to the seller of the cattle.
>
> Q. Where they are purchasing the livestock, where a commission agent is purchasing the livestock themselves and then collecting from you for both the purchase amount and his commission, how often would his commission be separately stated would you say?
>
> A. Well, a lot of them do this: say this order buyer or commission buyer is buying the cattle and he paid 60 cents a pound for the steers so he paid the seller of the livestock 60 cents. When he draws a draft on us, he shows it at 60-1/2, which the commission is included. Now, he could have written down the cost of the cattle, plus commission 50 cents. It is done various ways, but we have one order buyer that does that. He just adds it to the price of the cattle. Mike is practically the only order buyer we purchase from that pays expenses. Within the States, the only expense you have on the cattle besides the cost of the cattle themselves is the freight. They do not have -- why pay the freight bills ourselves. Mike, most of the cattle he buys, it saves in our bookkeeping and our accounting, he pays the hauling. From California he will pay the hauling, then bill us at a price which includes his commission and the hauling.
>
> Some order buyers purchase cattle at a salesyard for instance. They will have the salesyard add on the commission and then the salesyard will pay them. In other words, say that the commission came to $200 for the cattle that he bought. The salesyard will put on the commission because that way the

order buyer gets his money immediately and it is done that way.

. . . .

Q. Where the order buyer is being paid by you for both the commission as well as the purchase amount which he has previously paid for livestock, could you give us a rough percentage of how often that commission would be separately stated on the account?

. . . .

A. You are talking about a transaction where the order buyer pays for the cattle with his own check?

Q. That is correct?

A. And draws a draft or we send him a check, our check for the cattle, including the commission.

Q. That is correct. And sometimes the freight.

Q. How often would the commission in that situation be separately stated on the accounting or billing to you?

A. As a separate figure. Some order buyers always show it separately, what the cattle cost plus the commission. Some order buyers include it. In other words, I know the cattle cost 60 cents, but on his when he shows us a figure it is shown as 60-1/2 which includes his commission. To me it is just a way -- it all amounts to the same -- it is just a way of putting it down on paper.

Q. Would you say 50 percent of the time it might be separately, say that 50 percent of the time it might be included?

A. I would say more often than not it is included in the figure when he draws our draft or we send him a check, his commission will be part -- in other words, if cattle cost 60 cents and 50 cents commission, most of the time the cattle will show on our record of costing 60-1/2 cents.

. . . .

Q. So there are other transactions outside of these in which the commissions are directly stated in some manner?

A. Well, a lot of times they are not stated on the documents. I would say a big share of the time they are not. Like I stated earlier, if a man buys cattle at 60 cents in Oregon, for instance, he will -- he pays for those cattle at 60 and I have to trust what he said he paid, 60, that he did pay 60 because we have no documents to back up what he paid. Then we'll pay him 60-1/2 or he will draw a draft on us for 60-1/2. Of course I know what I have paid for the cattle. I know what the commission is without him putting it down. On the second line,

commission, 50 cents a hundredweight, "X" being amount of dollars.

Q. You would agree with me, though, there are other transactions in which the commission is specifically stated?

A. Yes.

Respondents' purported expert witness, Mr. Frye, recognized that commissions are paid in various ways, particularly in the case of small numbers and small dollars. He testified (Tr. 681–83):

> JUDGE WEBER: Is it common that there are a variety of arrangements where there are commission deals, order buying, arrangements, that the commission is paid in a variety of different ways contingent upon the discussion of parties and the agreement of the parties with reference to it?
>
> For example, the commission might be paid by the order buyer purchasing the cattle for $62 at a market, but paying the market $62.50 for the cattle and the market then giving the check back to the order buyer for his 50 cents a head commission? That's one type. It has been described.
>
> Another type is where the order buyer might purchase the cattle at a market and write a check or a draft for his own commission on his principal's check or draft. That is a second category. That has been described.
>
> A third type of arrangement that has been described is where periodically the principal pays the order buyer for the number of cattle he has purchased during that particular period.
>
> Are those types of arrangements common or unusual in your understanding, your view?
>
> THE WITNESS: Sir, I would say those are common in small numbers and small dollars.

Mr. Kienow, Mr. Monson and Mr. Schaake, whose expertise was regarded by the ALJ as much greater than that of Mr. Frye (Initial Decision at 3), categorically stated that an order buyer's commission is not separately stated on the invoices in a great many cases, i.e., in

United States should separately show his commission on the invoice. But, as shown above, that is not done in about half the transactions. In view of the small size of the Packers and Stockyards Administration's staff, and the enormity of its regulatory task, it is not likely that complainant will expend the necessary money and manpower to obtain compliance with this regulation in the foreseeable future.

VI. The Feeders, Who Were in Daily Contact with Respondents (a Circumstance Indicating Agency), Discussed the Rate of Exchange with Respondents. Respondents Had No Risk of an Exchange-Rate Change Because Respondents Continuously Bought Canadian Money as They Were Purchasing the Livestock, and any Slight Exchange Loss Was Passed On to the Feeders.

As shown in § II(A)(2), the feeders testified that they were in daily telephone contact with Mr. Donaldson (Tr. 219-45, 296-314, 318-19, 390-91). This is a factor indicative of an agency relationship. *Lubbock Feed Lots, Inc.* v. *Iowa Beef Processors, Inc.*, 630 F.2d 250, 264, 270 (5th Cir. 1980); *Valley View Cattle Co.* v. *Iowa Beef Processors, Inc.*, 548 F.2d 1219, 1222 (5th Cir.), *cert. denied*, 434 U.S. 855 (1977).

During the daily telephone conversations, Mr. Donaldson discussed the exchange rate with the feeders. As Mr. Monson testified (Tr. 391):

> A. He communicated with us almost daily, if not daily, sometimes two or three times a day. He would say, "I am on this set of cattle; they can be bought for "X" amount of funds, but I need the funds." He would compute it back to Canadian funds right at my desk. We would say, "Go ahead and buy them," or, "Do not buy them."

Similarly, Mr. Schaake testified that Mr. Donaldson discussed the exchange rate with him during the telephone conversations. He testified (Tr. 229-30, 252):

> Q. . . . Concerning the exchange rate which you have noted is contained on this document [CX 44, p. 7; JO Ref. 40, p. 50], did you personally also have occasion to discuss the exchange rate with Mr. Donaldson?
>
> A. Yes, we had to discuss the exchange rate to know what we could pay in Canada for the cattle so we could determine about what they would cost delivered to the feedlot because that would determine whether we bought the cattle or not, is

the delivered price.[38]

. . . .

> A. . . . As far as I knew we agreed on a price that we would pay up there on the cattle with Canadian money, Mike would buy the cattle, pay all the expenses and bill it.

Respondents were not subject to risk from exchange-rate changes because the feeders advanced large blocks of money to respondents so that they could get a better exchange rate, and buy the Canadian money at the time they were purchasing the livestock (§ III, *supra*, see, also, Tr. 223-24).

Accordingly, the rate quoted to the feeders in the telephone conversations was ordinarily the rate paid by respondents for the Canadian money.

Moreover, the "delivered" price which Mr. Donaldson quoted to the feeders over the telephone was, from time to time, increased on the invoices to the feeders, i.e., unexpected increases in the cost of the cattle due to exchange-rate fluctuations or other reasons were passed on to the principals. As Mr. Schaake testified (Tr. 223, 273):

> Q. Page 7 then of Complainant's Exhibit No. 44 [Schaake's memorandum of Tony Seubert's telephone call as to the breakdown on 323 steers, *supra*, < I(B)(3)]?
>
> A. This is, to the best of my recollection, when we got the final settlement on the cattle I thought they were higher than what Mike and I had talked.

. . . .

> BY MR. MILLER [respondents' counsel]
>
> Q. Just from looking at it [CX 56, p. 5, involving 172 head, 73 head and 277 head] we can't really figure out what the discussion was, correct? Just from looking at the document we can't figure out the content?
>
> A. . . . I am sure that those cattle did cost us, the heifers cost 60, which was 2 cents a pound more than we had talked and the steers cost $65.76, just a little more than that

Similarly, Mr. Van de Graaf testified that the invoice
times, higher than the price discussed over the telephon
(Tr. 305, 307):

. . . .

Q. Did you also discuss with Mr. Donaldson the exchange rate?

A. Yes. That changed.

Q. What were your discussions? What was the substance of your discussions?

A. He knew what the rate was and the change and what the cattle was going to cost. Normally he said, "Dick, those cattle cost -- those cattle will be tested at the border and weighed with a 4 percent shrink. They should come in on the net weight."

We talked different times what the price was going to be, but it was always just a little more than what he said because anybody could go up to that exchange that day and see what the exchange is between U.S. and Canadian funds and tell you what that is going to be off that feedlot.

In addition, as shown in § II(A)(2), *supra*, when Mr. Donaldson was quoting a telephone conversation with Mr. Schaake, he testified (Tr. 808):

> The statement back to me [from Mr. Schaake] was, "You always tell me a price and then it's always more than what you told me."

Hence additional costs to respondents, such as from exchange-rate fluctuations, were passed on to the feeders by respondents.[39]

For the foregoing reasons, (i) the daily telephone communications between Mr. Donaldson and the feeders is a significant indication of an agency relationship, and (ii) there was no risk to respondents resulting from exchange-rate fluctuations.

VII. Although the Feeders Charged Back to Respondents for Death Loss Occurring During Transit, Respondents Had No Real Financial Risk but, Rather, Merely Handled the Paperwork Involving the Insurance Payments. The Insurance Costs Were Passed On to the Feeders.

Respondents' purported expert witness, Mr. Frye, testified that one of the factors indicating a dealer relationship was the fact that the feed-

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[39] Spencer Livestock Commission Co.'s income tax return for the period involved in this case, i.e., the fiscal year ending August 31, 1982 (RX 104, p. 1), shows that on gross sales of $26,135,390 (RX 104, p. 1, line 1(a)), Spencer incurred a Canadian exchange loss of only $3,520 (RX 104, attachment for page 1, line 26-Other Deductions). Since Spencer does a large dealer business in addition to its commission transactions, I infer that the Canadian exchange loss resulted from dealer transactions, rather than commission transactions. (During the following fiscal year ending August 31, 1983, Spencer similarly incurred a Canadian exchange loss of only $4,039 (CX 81, p. 12)).

ers charged back death losses to respondents (e.g., Tr. 590). However, the record shows that the risk of death loss is insured against (usually as part of the total freight costs), and that respondents did not actually have a financial risk as to death loss, but merely handled the paperwork incident to the insurance coverage. The insurance costs were included in the total costs passed on to the feeders.

Complainant's principal investigator, Mr. Kienow, testified with respect to one of the typical transactions involving Sam Cattle Company (Monson). He testified that although Monson deducted the cost of one dead animal from respondents' invoice price, Mr. Kienow learned that (i) Parslow & Denoon, Ltd. (Denoon), the Canadian commission firm that dealt with Mr. Donaldson, had arranged for the freight payment to Parkland, the trucker, (ii) insurance was included in the freight, and (iii) Denoon received the insurance payment for the dead animal. (I infer on the basis of these facts and other testimony set forth below that the insurance proceeds were passed on by Denoon to respondents.) Specifically, Mr. Kienow testified (Tr. 417-18, 420-27):

> A. Yes. Line number 11 [CX 20, p. 1] sets out that there was a dead in the shipment from Canada to SAM Cattle Co.
>
> Q. With respect to the payment that was made by SAM Cattle Co. for the 226 head, how does this dead become relevant, looking at your tabulation?
>
> A. It had to be subtracted from the number of head that were invoiced and the amount of money invoiced SAM Cattle Co.
>
> Q. During the course of your investigation, did you receive information concerning who was standing the loss for the dead such as listed on your tabulation here?
>
> A. Yes, we did.
>
> . . . .
>
> MR. MILLER: Before he tells us what he learned, who he learned it from.
>
> JUDGE WEBER: Okay.
>
> THE WITNESS: It was RCMP contacted an individual by the name of Ron Bird with the Parkland Freight, and Mr. Bird advised that the --
>
> . . . .
>
> BY MR. HOCHBERG:
>
> Q. Mr. Kienow, did you receive information concerning who stood the loss for the deads from a second source? That is, in addition to the Royal Canadian Mounted Police who received their information from Mr. Bird?

A. Yes. We contacted the insurance agent who insured the livestock from Canada into the U.S. for Parkland Cattle Liners.

Q. Insured the livestock for whom?

A. Denoon Live Stock.

Q. What was the name of that insurance company?

A. Hartford Insurance.

Q. When you say "we" contacted the insurance agent, who do you mean by "we"?

A. Mr. Marone [, complainant's Regional Supervisor at Portland, Oregon,] and I.

MR. HOCHBERG: I would now propose, since Mr. Kienow has established that there are two sources for this same information which he received, that there is certainly sufficient credibility for his testimony to be allowed.

MR. MILLER: Can I be permitted to ask another question in aid of objection?

With respect to this Hartford conversation, when did it occur?

THE WITNESS: My conversation would have occurred in, I believe, May or June of 1984.

MR. MILLER: Specifically who did you speak with?

THE WITNESS: A guy by the name of Stan Switz (phonetic). The spelling I don't recall right now.

MR. MILLER: Where is he located?

THE WITNESS: In Edmonton, Alberta, Canada.

MR. MILLER: What is his official capacity with Hartford Insurance?

THE WITNESS: He was the agent there in Edmonton.

MR. MILLER: Was he under oath at the time you spoke with him?

THE WITNESS: No, he was not.

MR. MILLER: Have you received from him any confirmation either in the form of a sworn affidavit or otherwise confirming the information that he provided to you?

THE WITNESS: You mean written information, his words?

MR. MILLER: Yes. Has he written you a letter or any other -- sent you any other statements or anything in writing that he has signed?

THE WITNESS: He has submitted documentation regarding a shipment of livestock from Canada into the U.S., the policies themselves.

MR. MILLER: With respect to these specific transactions and the handling of insurance losses on these specific transactions, has he sent you a written statement explaining how those are handled or who paid them?

THE WITNESS: No, I don't believe so.

. . . .

BY MR. HOCHBERG:

Q. Mr. Kienow, please describe the information received concerning who stood the risk of loss on the deads as exemplified by your tabulation, Complainant's Exhibit 20, line 11.

A. The insurance was included in the freight. Denoon Live Stock received the payment in regards to the deads.

. . . .

JUDGE WEBER: Mr. Miller, I am open to objections on my questions if you feel they are out of line.

Is that consistent with your understanding of the industry pattern in this region?

THE WITNESS: In this region, it varies, but the insurance is normally included in the freight amount.

. . . .

BY MR. HOCHBERG:

Q. When you say the freight amount, Mr. Kienow, could you tell us a little bit more specifically what you mean?

A. It would be the cost of shipping those livestock into the U.S. to include the insurance charge.

Q. What I am getting to is, you have testified, then, in this particular type of transaction, the cost of the freight was in fact passed all the way along ultimately to Monson.

Am I to assume from that that Monson, by ultimately absorbing the cost, the freight stood the risk of loss for the deads?

. . . .

THE WITNESS: Yes. Monson would pay for the amount that Monson [Spencer] invoiced, including the amount of the freight. Denoon stood the loss of the dead because Denoon paid Parkland Freight.

BY MR. HOCHBERG:

Q. You are talking about paying directly?

A. Right. Denoon paid the freight amount to Parkland.

Q. Who arranged for the trucking in these transactions?

A. Denoon Live Stock.

JUDGE WEBER: Who is Denoon?

THE WITNESS: Denoon is the person from whom Mike Donaldson purchased the livestock through in Canada.

JUDGE WEBER: The original seller?

THE WITNESS: It is the agency that Donaldson worked through in Canada.

JUDGE WEBER: Oh, a brokerage?

THE WITNESS: That's true.

JUDGE WEBER: Okay. Go ahead.

BY MR. HOCHBERG:

Q. By "a brokerage", can you describe that a little bit more fully?

A. It was the commission agency that Donaldson worked with in Canada.

Q. You have testified that Denoon arranged for the freight and specifically, then, based upon your understanding and your experience in the industry, who would normally stand the risk of loss for the deads?

A. The person who arranged for the freight.

Similarly, Mr. Schaake testified that although he deducted the cost of one dead animal from his payment to respondents, it was his understanding that Mr. Donaldson deducted that amount from the freight charges paid to the trucker. Mr. Schaake testified (Tr. 274-75):

Q. On [CX 56, p. 6, involving respondents' breakdown as to] 277 [steers to Schaake], I wonder if you could explain for me the computations which are under that item 277 steers.

. . . .

A. The one that died?

Q. Yes.

A. When the truck arrived at the feedlot there was a dead steer. So what is our usual practice, we will deduct, if we are paying the freight, we would have deducted the average weight and average cost of the steer from the truck. As long as Mike [Donaldson] was paying the freight we deducted it from him.

Actually, what we did, we didn't deduct it, he wrote us a check for the weight for an average weight steer. Then the

truck, it looks like a Parkland no. 9 truck, I presume Mike then deducted that off when he paid Parkland.

Q. Would it be fair to say then that with respect to the risk of death during transit, that in these transactions Mike had that risk?

A. Well, I would say -- yes, as far as we were concerned, yes. I presume the trucker, the trucker stands the risk of the cattle.

Likewise, Mr. Van de Graaf testified that even though he deducted the cost of four steers (that were discovered dead at Customs) from respondents' invoice amount, he normally requires that the trucker is insured, and it is his understanding that the truckers reimburse everybody for such death losses, including livestock operators such as respondents. Mr. Van de Graaf testified (Tr. 327–31, 333–34, 342–43):

Q. What is reflected by the credit [of $2,669.48 deducted by Van de Graaf from respondents on CX 32, p. 7,] on the four steers entry?

A. The steers must have never showed up, must have been what is discounted off was taken off because maybe the truck was overloaded, I am not sure. That is not my writing on that. That is one of our bookkeeper's.

Q. Could it be that that was because of deaths occurring in transit, do you think?

A. I am not sure. Most of the time the trucks have insurance on their cattle. They are notifying us that there is a shortage of cattle. If we have the actual invoices, then the weights would show us if there was a death. I never did hear if there was a death loss.

Q. Let me ask you to do this: let me ask you to assume this is because of deaths occurring in transit. Would that be reflected then if it subsequently turns out that the evidence shows there were four deaths occurring, would my understanding be correct that you had in effect charged those back to Mc-Donaldson?

A. Normally if there is a death loss on a truck the trucker would pay us for the loss of the cattle.

. . . .

Q. Let me represent to you I think the evidence will ultimately show in this case that when these trucks passed through Customs at the border the animals were discovered dead and they were removed from the trucks at that point. Would that be a possible explanation for that credit? Would that be possible, do you think?

A. It is possible.

Q. So if the total amount of money received in this case -- you deduct from the total of this $2,669.48; correct?

A. Yeah. Our bookkeeper has made these figures here and she more or less got the figures from somebody. I assume since the check is made out to Spencer Livestock, that Mike Donaldson maybe called those figures in and the deduction.

Q. It is your testimony, as I understand it, that Mr. Donaldson was to work on a 50 cents per hundredweight commission, correct?

A. Yes.

Q. Just looking here, if we added up those weights of the -- still looking at those transactions there, I get a total weight with respect to this invoice of 293,665. Let me check that.

MR. HOCHBERG: May I ask what page you are on?

MR. MILLER: Still looking at page 7 of Exhibit 32?

BY MR. MILLER:

Q. I add those up to $293,665.

A. Yes, pounds.

Q. Pounds, I am sorry. Does that seem about right to you?

A. What's that figure 293,665? I don't have no adding machine like you do. I presume that is correct.

Q. And a 50 cents commission on that 293,665 I computed to be $1,468. Does that seem about right to you?

A. I suppose.

Q. Let's assume for our purposes that those figures are correct. The reason I asked you to go through these numbers h -- is that it appears to me that had Mr. Donaldson really to work on a 50 cents commission for his services, in e $1,468, and then recharged back for the dead ani- -- he would have lost $1,201. I guess my question to s it seem reasonable to you that a person would o do those services for the privilege of losing

ers reimburse everybody on the death loss on own your own truck. Most of them have pay it out of their pocket if they have any

Then make it hypothetical and present it to ical basis and you can have the Court assume

> Donaldson was responsible for those losses of cattle on the trucks.
>
> Does that seem like a dumb deal for Donaldson to have entered into, so dumb he probably wouldn't have entered into it? Are you with me?
>
> THE WITNESS: Yes. I understand the trucker deal. It is not normal practice in the cattle business that the guy that sent the cattle is going to stand the loss; the trucker is going to stand the loss.
>
> THE COURT: Assume Donaldson is the trucker for the deal is the point the gentleman wants you to consider.
>
> THE WITNESS: If he is a trucker it is a lot easier sometimes to get trucks in Canada -- that might be away from your question -- you know, to get trucks out of Canada that is ready to load the cattle, but we find out some of our buyers would like to get involved in trucking and we do not want them to because the trucker sometimes gets kickbacks on the freight which should go to the feedlot.
>
> THE COURT: The only question he wants an answer on, if he can get one, is whether it seems probable that a skilled cattle dealer would enter into a transaction of this nature where he would assume the risk of loss in transportation.
>
> THE WITNESS: I would say, I would say no.
>
> . . . .
>
> THE WITNESS: We advanced him [Donaldson] money to pay for the cattle. He didn't have funds to pay for that cattle so we advanced the funds for him to pay for the livestock. We normally require that the trucker is insured. We cannot take a chance of a truckload of cattle getting tipped over and kill some cattle.

Most of the livestock involved in the transactions relevant here were handled in Canada by Parslow & Denoon, Ltd. (Denoon). Mr. Kienow's testimony with respect to a typical transaction involving Monson, discussed above, shows that the livestock was transported insured, and that Monson paid for the insurance as part of the total freight charges.

As to other transactions not handled by Denoon
tains documentary evidence showing insurance
feeders by respondents. For example, the
(JO Ref. 57, p. 57) for 48 steers is part of
p. 57) Canadian invoice amount
passed on to Schaake (Table, *su*
$49.05 insurance charge (JO Ref. 90, p. 60) for 48 steers is part of the
$34,793.89 (JO Ref. 93, p. 60) Canadian invoice amount passed on to Schaake (Table, *supra* p. 70, col. 5).

As another example, the $100.19 insurance charge (CX 46, p. 1) for 46 head costing $34,971.21 (CX 46, p. 1) is part of the subtotal of

respondents' Canadian costs passed on to Schaake (CX 45, p. 1, col. 8; Stipulations filed July 23, 1985, at 7, ¶ 10(a)). Similarly, the $66.49 insurance charge (CX 13, p. 3) for 61 heifers is part of the $27,937.41 (CX 13, p. 3) Canadian invoice amount passed on to Monson (CX 12, p. 1, col. 5). Likewise, the insurance charge of $1.25 per head (CX 13, p. 5) on 69 heifers ($1.25 x 69 = $86.25) is part of the $1,725.15 trucking charge at $3 per cwt (CX 13, p. 5) (546.30 x $3.00 = $1,638.90; $1,638.90 + $86.25 = $1,725.15) that is included in the $37,921.80 total amount Canadian (CX 13, p. 5) that was passed on by respondents to Monson (CX 12, p. 1, col. 11).

Of great importance is the fact that there is *no* evidence by or on behalf of respondents contradicting complainant's evidence as to the insurance payments. If respondents did not receive the insurance payments for the dead animals (directly or indirectly), it would have been quite easy for Mr. Donaldson to have said so. He did not!

Although the record with respect to the exact details as to how the death-loss insurance payments were obtained by (or passed back to) respondents is not as overwhelming as it is with respect to the other issues, a preponderance of the evidence supports the ALJ's findings that it "is the custom in the livestock industry for the trucker to stand the risk of loss for dead or crippled livestock and to obtain insurance against such risk of loss . . . [and in] connection with these transactions, the Canadian sellers of the livestock insured the livestock purchased by respondents and credited respondents' account for livestock which subsequently died or were crippled" (Initial Decision at 17).

VIII. Miscellaneous Factors Indicative of Agency Relationship, or Not Inconsistent with Agency Relationship.

Respondents' invoices to the feeders include the names of Mike Donaldson and Spencer Livestock *Commission* Company (emphasis added) (e.g., CX 44, p. 1, *supra* p. 40). By using the word "COMMISSION" in their name, respondents "look" like a commission company.[40] In addition, Mr. Schaake testified that "Mike Donaldson was well know[n] as an order buyer in [Schaake's] trade area" (Tr. 217), [...]n and Mr. Van de Graaf also knew Mike Donaldson as

[...]he "duck" analogy (i.e., "If it looks like a duck, walks like a [...] like a duck, it is a duck!"), respondents also act like a commis[...]e., they are in daily telephone contact with the feeders (§ VI), [...] detailed breakdowns of *their costs*, including breakdowns showing 50¢ per cwt commission, and they show an average cost on most of their invoices, generally in "odd" amounts, *rather than* a true price per cwt (§§ I(B)(2)-(3), I(C)(2), II(B)(2), II(C)(2), IV)), and talk like a commission company, see the testimony of the feeders (§ II(A)(1), II(B)(1), II(C)(1)) and the telephone memoranda of their phone calls referring *to the 50c* per cwt commission (§ I(B)(1)-(5)).

an order buyer (§ II(B), (C), *supra*). Although this factor is consistent with respondents' status as a commission buyer, I give it little or no weight because it is common in the livestock industry for commission buyers to also engage in other transactions as a dealer.

Respondents' purported expert witness, Mr. Frye, in reaching his conclusion that respondents' transactions with the feeders were dealer transactions, gave significant weight to the fact that respondents paid for the livestock in Canada, and the feeders' payments were made solely to respondents, rather than to respondents and the Canadian sellers. He also gave significant weight to the fact that respondents paid the other expenses, such as freight, feed and inspections.[41] (Tr. 586-646). However, those circumstances are not shown in the Restatement of the Law of Agency to be a factor inconsistent with an agency relationship. See *Restatement (Second) of Agency* §§ 62, 382, 438 (1958). As stated in the *Restatement*, § 62 comment on subsection (1):

> Likewise, a purchasing agent, supplied with his principal's funds, is prima facie authorized to use them for a payment at the time when the contract is made or, if not supplied with funds, to advance his own money, if he is also authorized to contract for such advance payment.

Where an agent advances his own money to pay for a commodity purchased for his principal, the principal is, of course, "under a duty to indemnify the agent" (*Restatement, supra* § 438(1)). Accordingly, under the *Restatement*, the fact that respondents paid for the cattle and paid other expenses in Canada and then received reimbursement from the feeders is not inconsistent with an agency relationship, and is not even a factor tending to indicate a dealer arrangement.

However, in *Valley View Cattle Co.* v. *Iowa Beef Processors, Inc.*, 548 F.2d 1219, 1223 (5th Cir.), *cert. denied*, 434 U.S. 855 (1977), and *Lubbock Feed Lots, Inc.* v. *Iowa Beef Processors, Inc.*, 630 F.2d 250, 271 (5th Cir. 1980), discussed in § III, *supra*, the courts held that the facts that Heller (found to be an agent) purchased livestock in his own name, and Heller paid the sellers and then obtained reimburse- ment from IBP (the principal) were factors indicating a ment. Nonetheless, the courts upheld the juries' fin relationship between Heller and IBP because of ot circumstances leading in the opposite direction. I give this factor little or no weight.

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[41] As shown in §§ I(B), II, and VI, *supra*, respo all of those expenses.

Respondents contend that they could not have made a profit at 50c per cwt on the transactions involved in this case. That argument is irrelevant and erroneous. Since the feeders testified categorically that respondents agreed to purchase the livestock on a 50c per cwt commission basis (§ II, *supra*), and their testimony is supported by specific documentary evidence (§§ I, II, *supra*), and general documentary evidence (§§ III, IV, *supra*), it is irrelevant whether or not the transactions were profitable to respondents.

However, the record shows that the transactions were profitable at 50c per cwt. The feeders involved here each bought livestock from 10 to 12 order buyers, and 50c per cwt was the maximum commission they paid to any of the order buyers (§ II, *supra*). Furthermore, Mr. Donaldson's testimony shows that his expenses were of the same nature as the expenses of the other order buyers (although he stated that gasoline, hotels, meals, etc., cost a little more in Canada). Mr. Donaldson testified (Tr 812-13):

> Q. . . . Well, let me come back to that. Mr. Donaldson, you know people who operate as order buyers, don't you, as commission agents?
>
> A. Yes
>
> Q. They will buy for their principal in many different regions also, will they not?
>
> A. Yes.
>
> Q. And they will fly around the country or the region buying livestock in various areas?
>
> A. Yes.
>
> Q. And staying in hotels?
>
> A. That's correct.
>
> Q. With respect to your travel around Canada, you have testified that you had a great many expenses. Is that correct?
>
> A. That's correct.
>
> Q. Were your expenses in Canada greater than your expenses in the United States?
>
> A. Yes.
>
> Q. What expenses were greater in Canada?
>
> A. The Canadian dollar will only buy 70 percent of what \merican dollar will this year. That year I believe it was 80 percent. Your gasoline, airline tickets, hotels, nything that you do just costs you a little more there.

son's implication that Canadian expenses were greater in he Canadian dollar bought only around 80% of what the

American dollar bought in 1982 is specious. That factor was to the *advantage* of Mr. Donaldson, who exchanged United States dollars for Canadian dollars and spent Canadian dollars in Canada (Tr. 30–32, 789; see note 12, *supra* p. 52). For example, the average exchange rate was 1.2204 in March 1982 (CX 17, p. 4) and 1.2248 in April 1982 (CX 17, p. 3). The average exchange rate for both months combined was 1.2226 (1.2204 + 1.2248 – 2 = 1.2226). That means that for each $100 in United States funds that respondents exchanged at their Canadian bank, they received an average of $122.26 in Canadian funds during March and April 1982. In other words, during that period 82c in United States funds paid for a one dollar Canadian expense ($1 – 1.2226 = $.8179, which rounds to $.82).[42]

Furthermore, respondents' legitimate commissions earned in the relevant 37-day period (March 3, 1982–April 8, 1982) on the 3,361 head of livestock involved in this proceeding total $15,105.88 (§ XI(B), *infra*). That is undoubtedly less than half of respondents' total commissions or profits earned from the same trips. For example, respondents earned $3,172.04 from 376 head, 179 head, and 56 head delivered to Van de Graaf during the relevant time period that are not involved in this proceeding (CX 28, p. 3).[43] Moreover, respondents were buying livestock on the same Canadian trips for several other feeders (Tr. 397–98; CX 70–71). One of the other persons for whom respondents were buying livestock in Canada, Mr. Para, bought between 3,000 and 6,000 cattle from respondents in March and April 1982 (Tr. 776). Hence the commissions or profits made by respondents from others as a result of the Canadian trips would undoubtedly have exceeded the $15,105.88 earned from the feeders as commissions on the 3,361 head of livestock involved in this case. Accordingly, the record does not support respondents' assertion that they could not have made a profit at 50c per cwt on the transactions involved here.

Respondents contend that a dealer arrangement is indicated by the fact that various Customs documents were in Mr. Donaldson's name (Appeal Brief at 12–13). Complainant counters that more than half of

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[42] I know from personal experience in vacationing in Canada in each of the last 6 years that even though gasoline, lodging and meals were frequently a little more expensive than in the United States, after considering the advantage of the favorable rate of exchange, the expenses in Canada were about the [illegible] United States, or frequently less.

[43] $.50 x (4,116.58 + 1,645.70 + 581.80) = $3,172.04 (CX 28, p. 3). Mr. Van de Graaf testified that all of respondents' purchases for him in March and April 1982 were on a 50c per cwt commission basis (§ II(B)(1)).

the relevant documents were in the feeders' names, rather than respondents (Response to Appeal at 11–12):

> In their appeal brief, respondents first offer a most monumental understatement – "On some occasions, a form filled out by Mr. DeNoon in Canada listed individuals other than Mr. Donaldson [as the buyer of the livestock]." Brief, p. 12. These "forms," in fact, are the actual invoices showing the Canadian cattle being sold. Complainant points out that 38 of these 48 Canadian invoices contained in complainant's exhibits show a sale from the Canadian seller to either Monson, Van de Graaf or Schaake, *not* to respondents (e.g. CX 13, p. 2). Respondents continue their faulty analysis by stating on page 12 of their Brief that "In each case, the custom entry records of the United States Custom Service are in the name of the respondents." In fact, approximately half of these consumption entry certificates (e.g. CX 14, p. 13) and more than 90% of the customs invoices made out by the Canadian sellers (e.g. CX 14, p. 14) show either the feeder, or the feeder and respondents purchasing the livestock.

In view of the categorical testimony by the feeders that the transactions involved here were commission transactions, supported by documentary and other evidence, I give little weight to the names on the various documents since either respondents' names or the feeders' names could appear on these forms irrespective of whether the transactions were on a dealer or agency basis.

IX. The ALJ, Who Saw and Heard the Witnesses Testify, Found that the Credibility of Respondent Donaldson Was, at Best, Weak, and that the Persuasiveness, Expertise, and Credibility of Complainant's Witnesses Were Clearly Superior to Respondents' Witnesses. His Determination Is Entitled to Great Weight.

The ALJ, who saw and heard the witnesses testify, found that the credibility of respondent Mike Donaldson was, at best, weak, and that the credibility and persuasiveness of complainant's witnesses were clearly superior to that of respondents' witnesses. He stated (Initial Decision at 2, 3, 6, 25, 26):

> The persuasiveness, expertise, and credibility of complainant's witnesses were clearly superior to respondent's witnesses.
>
> Basically, the strong and persuasive credibility of the feedlot operators' testimony describing their relationship with respondents is a keystone factor here. They were not "disgruntled", as characterized by respondents, but were aggrieved.
>
> . . . .
>
> The industry experience and expertise of respondents' witnesses were much less impressive than complainant's witnesses. The interpretations and explanations offered by respondents' experts do not harmonize well with accepted industry practices.
>
> . . . .
>
> The credibility of respondent Mike Donaldson was, at best, weak.
>
> . . . .
>
> 11. Respondent Mike Donaldson failed to show the credibility, persuasiveness, and integrity necessary to give much weight to his contentions. He shows an indifference to his legal and ethical responsibilities.
>
> . . . .
>
> 15. The record fails to establish or even suggest any bias, prejudice or other evil motive, motivating the testimony of any witnesses appearing against respondent. Respondent's characterization of some witnesses as "disgruntled" is unsupported by the record.[44]

The superior advantages of the ALJ, who saw and
nesses testify, for determining their credibility, i
the expertise and credibility of expert witnesses, is

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[44] Respondents contend that at the hearing the ALJ re
"highly skilled" (Appeal Brief at 36). However, they mi
ments. The ALJ referred to "four highly skilled people who
ing these arrangements. Three have one perspective and th
perspective" (Tr. 820). The ALJ was obviously referring t
Mike Donaldson.

stated in *Great Western Food Distributors* v. *Brannan*, 201 F.2d 476, 479–80 (7th Cir.), *cert. denied*, 345 U.S. 997 (1953), on appeal from a decision by USDA's Judicial Officer:

> Often the "most telling part" of the evidence is not apparent from the printed page, "for on the issue of veracity the bearing and delivery of a witness will usually be the dominating factors". N.L.R.B. v. Universal Camera Corp., 2 Cir., 190 F.2d 429, 430. Thus, "we may not disregard the superior advantages of the examiner who heard and saw the witnesses for determining their credibility, and so for ascertaining the truth." Ohio Associated Tel. Co. v. N.L.R.B., 6 Cir., 192 F.2d 664, 668.
>
> . . . In addition, the technical and complex nature of the charges made necessitated recourse to extensive use of expert testimony, for here, as is often the case in proceedings under regulatory statutes, the evidence is largely of a dual nature: statistical and parol interpretation of the statistics. In the latter aspect the referee [ALJ] again possesses a greatly advantageous position, for, as the several experts testify, he is able to ascertain their grasp and knowledge, their perspective and understanding of the materials presented to them for interpretation. Their conduct on the stand may enhance or belie their status as experts. In short, anyone who has observed witnesses on the stand will know that those "who see and hear witnesses are much better equipped to weigh the evidence and determine the credibility to be extended to those testifying than are the judges of courts of review who do not enjoy the same advantages." Jennings v. Murphy, 7 Cir., 194 F.2d 35, 36.
>
> It would seem, then, that the function of this court is something other than that of mechanically reweighing the evidence to ascertain in which direction it preponderates; it is rather to review the record with the purpose of determining whether the finder of the fact was justified, i.e. acted reasonably, in concluding that the evidence, including the demeanor of the witnesses, the reasonable inferences drawn therefrom and other pertinent circumstances, supported his findings. To go further is to disregard the "most telling part" of the evidence. N.L.R.B. v. Universal Camera Corp., supra. With this in mind we approach the proof offered in this proceeding.

Similarly, in *Cella* v. *United States*, 208 F.2d 783, 788 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), a case involving false weights under the Packers and Stockyards Act, the court stated:

> The hearing officer observed these witnesses upon the stand. He was the trier of the facts. The matter of their credibility was for him to decide. Great Western Food Distributors v. Brannan, 7 Cir., 201 F.2d 476, 479.

Finally, in *Fairbank* v. *Hardin*, 429 F.2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970), also involving false weights under the Packers and Stockyards Act, the court stated:

> When the trier of the facts, as here, expresses a doubt on the validity of oral testimony, the reviewing authority should not substitute its own judgment for that of the Examiner unless his findings are hopelessly incredible or flatly contradict either a "law of nature" or undisputed documentary evidence. National Labor Relations Board v. Dinion Coil Co., 201 F.2d 484, 490 (2d Cir. 1952); see also United States v. Oregon Medical Society, 343 U.S. 326, 339, 72 S.Ct. 690, 96 L.Ed. 978 (1952).

Accord *Blackfoot Livestock Comm'n Co.* v. *USDA*, 810 F.2d 916 (9th Cir. 1987).

The "hopelessly incredible" rule just quoted is cited with approval by Professor Davis, who states in Davis, 3 *Administrative Law Treatise* § 17.16, at 336 (2d ed. 1980):

> When the agency adopts the ALJ's findings, the task of the reviewing court is normally easier; a common note that is struck is that an ALJ's findings adopted by the agency may not be upset unless it is "hopelessly incredible or flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony." NLRB v. Dinion Coil Co., 201 F.2d 484, 490 (2d Cir. 1952); International Union v. NLRB, 459 F.2d 1329, 1351 (D.C. Cir. 1972) (Tamm, Jr., concurring and dissenting); NLRB v. Stark, 525 F.2d 422, 425-26 (2d Cir. 1975), cert. denied 424 U.S. 967 (1976); NLRB v. Columbia University, 541 F.2d 922, 928 (2d Cir. 1976).

However, Professor Davis makes it clear that an agency is in a different position vis-a-vis an ALJ's findings of fact based on credibility determinations than a reviewing court. He states (*Id.* at 327):

> Because of the provision of § 557(b) that "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision," the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses, and even despite the hearing officer's observation of the witnesses. The law that had been established before the APA continues: "Even on a question of the credibility of contradictory witnesses, notwithstanding the advantage the examiner has of seeing and hearing them testify, the Board may differ from the conclusion of its examiner." NLRB v. Tex-O-Kan Flour Mills, 122 F.2d 433, 437 (5th Cir. 1941).

Respondents' principal "expert" witness was Mr. John Frye, a Certified Public Accountant. Although Mr. Frye works extensively with livestock records, he has no experience in the actual purchase or sale of livestock, either as a market agency or as a dealer (Tr. 655-56). Moreover, Mr. Frye admittedly knew respondent Donaldson since the 1970's (Tr. 647), and may have had a bias in favor of respondents. Mr. Frye was secretary-treasurer of Intermountain Cattle Co., whose president and vice president were indicted at the same time and for the same offenses as respondent Donaldson. Intermountain Cattle Co. and

these two officers were later named in the same Packers and Stockyards administrative complaint as respondent Donaldson charging false weight mark ups. (Tr. 664-69, 673-74; CX 5). At the administrative hearing in the present case, Mr. Frye used the terms "us" and "we" (Tr. 621-22), when he was actually referring to actions by "Tony [Seubert] and Mike [Donaldson]" (Tr. 622). In any event, I agree with the ALJ that Mr. Frye's testimony lacks persuasiveness.

Moreover, in the present case, there is so much documentary evidence supporting complainant's position that I would have overruled the findings by the ALJ if he had found in respondents' favor. (The documentary evidence includes telephone memoranda showing the 50c per cwt commission (§ I(B)), respondents' invoices which do not contain any true price per cwt (§§ I(C)(2), II(B)(2), II(C)(2), IV), respondents' breakdown as to the 272-head lot and the 585-head lot showing the 50c per cwt commission (§ II(B)(2)(b)- (c)), the "odd" prices on respondents' invoices (§ IV), and the documents showing advances of hundreds of thousands of dollars by the feeders to respondents (§ III)). Also, I necessarily weigh the testimony of the expert witnesses against my own 33-year experience with the Packers and Stockyards Act regulatory program,[45] and my views as to the relative expertise of the witnesses are identical to those of the ALJ.

X. Respondents' Argument that if Mr. Donaldson Acted as an Agent, He Was a Dealer-Agent (Not a Market Agency-Agent) within the Meaning of the Act Is Erroneous and of No Consequence.

Respondents argue that even if Mr. Donaldson acted as an agent, his activities as an agent fit the definition of the term dealer in the Act, rather than the definition of a market agency (Appeal Brief at 27-30). Respondents' argument, if true, would get them out of the frying pan into the fire. That is, just as a "[r]ose is a rose is a rose is a rose" (Gertrude Stein's Sacred Emily), an agent is an agent is an agent is an agent!

An agent is in a fiduciary relationship with his principals, owing them

[45] From 1950 to 1960, I participated in every case appealed to the Federal courts under the Packers and Stockyards Act. From December 1962, through January 1971, I was administrator of the Packers and Stockyards Act regulatory program. Since July 1972, I have decided every case under the Packers and Stockyards Act appealed to the Judicial Officer except one (in which I recused myself because of prior involvement as Administrator of the Packers and Stockyards Administration). In 1980 and 1981, I wrote the chapter (cited at the outset) of Shepard's/McGraw-Hill treatise on Agricultural Law relating to the Packers and Stockyards Act regulatory program, and each year I prepare the pocket supplement to that chapter.

the highest degree of care and loyalty.[46] The Act proscribes "unfair" or "deceptive" practices by market agencies or dealers (7 U.S.C. § 213(a)).[47] Accordingly, whether respondents acted as a dealer-agent or a market agency-agent when they fraudulently increased the prices and weights involved here is of no consequence in this case. In either case, the same 10-year license-suspension order would be issued, and the same cease and desist order would be issued. All that would change would be the omission of the findings that respondents violated 9 C.F.R. §§ 201.44, .45, which require market agencies to render a prompt and accurate accounting for purchases on order, and make records available for inspection.

Nonetheless, since it is important in the administration of the Act to have the terms market agency and dealer correctly defined by the courts, respondents' argument will be refuted.

The Act defines the terms "stockyard services," "market agency," and "dealer" as follows (7 U.S.C. § 201(b)-(d)):

> When used in this chapter--
>
> (a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with . . . the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock.
>
> . . . .
>
> (b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, [of] livestock;
>
> (c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services; and
>
> (d) The term "dealer" means any person, not a agency, engaged in the business of buying or selling merce livestock, either on his own account or as the or agent of the vendor or purchaser.

Under the plain terms of the Act, any person business of "buying . . . livestock on a com *agency*. The term *dealer* is defined as "any

[46] *Restatement (Second) of Agency* §§ 13, 387-431 (1958); *Midwest Farmers, Inc.* v. *United States*, 64 F. Supp. 91, 102 (D. Minn. 1945) (3-judge ct); *In re Saylor*, 44 Agric. Dec. ____, slip op. at 185 (Sept. 20, 1985) (decision on remand); *In re Bosma*, 41 Agric. Dec. 1742, 1744, 1751-54 (1982), *aff'd in part & rev'd in part*, 754 F.2d 804 (9th Cir. 1984).

[47] § *213.* Prevention of unfair, discriminatory, or deceptive practices

agency," engaged in certain activities. Accordingly, once a person fits the definition of a market agency (e.g., because he buys on commission), he cannot possibly be a dealer within the meaning of the Act. "Of course, statutory definitions of terms used therein prevail over colloquial meanings." *Western Union Telegraph Co.* v. *Lenroot*, 323 U.S. 490, 502 (1945).[48]

If the statutory definition of dealer had omitted the words "not a market agency," a person engaged in the business of buying livestock on commission would fit the definition of "market agency" and "dealer." But there is no basis for refusing to give effect to the words "not a market agency" in the definition of "dealer." As stated in *Ex parte The Public National Bank of New York*, 278 U.S. 101, 104 (1928):

> No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that "significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"

Respondents' argument that if Mr. Donaldson acted as an agent, he was a dealer, not a market agency, within the meaning of the Act is based on erroneous obiter dictum in *Solomon Valley Feedlot, Inc.* v. *Butz*, 557 F.2d 717, 720 (10th Cir. 1977). The issue in *Solomon* was whether a custom feedlot operator, that was primarily engaged in the business of feeding livestock for absentee owners (such as lawyers and judges), was required to register and post a bond as a dealer because it "aids" its customers in "the purchasing of livestock which are then placed at the Solomon Feedlot for feeding" and "in the sale of the cattle once they achieved the desired weight" (557 F.2d at 718–19). Solomon Feedlot did not charge a commission for such buying and selling activities (557 F.2d at 720). "Both sides concede[d] that Solomon is not a market agency" (557 F.2d at 719), undoubtedly because Solomon did not charge a commission for buying or selling activities. In holding that Solomon Feedlot was not a dealer, the court said (557 F.2d at 720):

> It would appear that the three groups of people engaged in purchasing livestock as dealers include (1) packers–buyers who are employed by packing plants to acquire cattle for slaughter;

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[48] ...rd *United States* v. *A. & P. Trucking Co.*, 358 U.S. 121, 124 (1958); ...lk *Co.* v. *Carnation Co.*, 355 U.S. 373, 375–76 (1958); *M.E. Blatt* ...d *States*, 305 U.S. 267, 279 (1938); *Fox* v. *Standard Oil Co. of* ... 294 U.S. 87, 95–96 (1935).

(2) commission people such as order-buyers; and (3) speculators, who buy in their own name to resell.

> The literature of the Packers and Stockyards administration supports this view of the Act. See PA-399, *The Packers and Stockyards Act, What It Is--How it Operates*. The above groupings are recognized in that literature which also recognized the distinction between the one who is regulated because he is engaged in the business in accordance with the statute and one who makes profit as a result of improving the animals.

As shown above, "commission people such as order-buyers" cannot possibly be dealers, under the Act, since they are included under the express definition of the term "market agency," and the term "dealer" is defined as "any person, not a market agency" (7 U.S.C. § 201(d)). Accordingly, the court's obiter dictum is erroneous.

The *Solomon* decision and the literature of the Packers and Stockyards Administration cited in *Solomon* is discussed in *In re Sterling Colorado Beef Co.*, 39 Agric. Dec. 184, 227-29 (1980), *appeal dismissed by appellant*, No. 80-1293 (10th Cir. Aug. 11, 1980), as follows:

> 23/ Presumably, the Court was referring [in the last sentence of its opinion quoted two paragraphs above] to the statement in the pamphlet, p. 2, that "[f]armers, ranchers, and feeders who are not dealers in interstate commerce are not required to register or file bond when buying to restock." . . .

> . . . I issued the P&S literature relied on by the Court when I was Administrator of the Packers and Stockyards Administration. . . . The literature "explains" the Packers and Stockyards Act regulatory program in six pages. It is a pamphlet designed as a "hand-out" to farmers or other persons interested in the Act in a very general way. It does not purport to go into all of the precise ramifications of the Act. In giving a general overview of those subject to regulation, the pamphlet states (pp. 1-2):
>
> > All interstate transactions in livestock--cattle, sheep, swine, horses, mules and goats--are subject to the provisions of the Packers and Stockyards Act.
> >
> > SUBJECT TO REGULATION
> >
> > More specifically subject to regulation ·· when *operating in interstate commerc*
> >
> > > Stockyards--both terminal ; kets which charge for service the public.
> > >
> > > Market agencies--person or sell livestock on co other services in connecti or sale of livestock.

> Dealers--persons or firms engaged in the business of buying and selling livestock for speculative purposes.
>
> Packer buyers--persons regularly employed by packers to purchase livestock for slaughter.
>
> Meat packers--whether buying livestock at stockyards, at their packing plants or in the country.

. . . .

In other literature distributed by the agency during the same general time period, the term dealer was defined in broader terms. In PA-810, Questions and Answers on the Packers and Stockyards Act for Livestock Producers (USDA, P&SA, July 1967), it is stated at p. 1:

Q. Under the Act, what is (1) a market agency, and (2) a dealer?

A. (1) A market agency is defined as any person engaged in the business (interstate) of (a) buying or selling livestock on a commission basis, or (b) furnishing stockyard services.

(2) A dealer is defined as any person, not a market agency, engaged in the business (interstate) of buying or selling livestock either on his own account or as the employee or agent of the vendor or purchaser. Dealers are *often* called traders or speculators, as they *usually* buy with the intention of reselling immediately. (Packer-buyers are considered as dealers buying for slaughter only) [Emphasis added [in *Sterling*]].

It is readily apparent that the literature cited by the court in *Solomon* does not support its obiter dictum that "commission people such as order-buyers" are "dealers." It is obvious that the court in *Solomon* was merely trying to show that custom feedlot operators are not included in the category of dealers. The court did not have before it the issue as to whether order-buyers buying on commission are dealers, as distinguished from market agencies. In fact, the court in *Solomon* does not even quote the definition of "market agency."

Although this case will be reviewed by the same court that decided *Solomon*, now that the issue is precisely presented as to whether a person buying on commission is a market agency or a dealer, it is inconceivable that the court would follow its erroneous obiter dictum in *Solomon* rather than the statutory definition. In addition, as stated above, the identical order would be issued in this case even if respondents

were held to be dealer-agents, rather than market agencies. [49]

XI. The 10-Year Suspension Order and Civil Penalties Totaling $30,000 Are Appropriate for Respondents' Willful, Flagrant and Repeated Violations, in View of the Three Prior Actions for Similar Violations.

A. Administrative Disciplinary Orders Issued by the Secretary in 1977 and 1980 Suspending Respondents' Registrations Initially for 21 Days and Subsequently for 1 Year (with 7 Months Held in Abeyance), and a $5,000 Criminal Fine and 3 Years' Probation in 1979, All for the Same General Type of Violations, Did Not Deter the Present Violations Committed During the Criminal Probationary Period.

Respondents' past history of violations similar to those involved here is the reason for the 10-year suspension period imposed in this case. (If this were the first proceeding against respondents, the suspension period would not have been longer than a few years.)

On June 22, 1977, an order consented to by Mike Donaldson (CX 3, p. 18) was issued suspending Spencer Livestock Commission Company's registration for 21 days (CX 3, p. 13), requiring Spencer to cease and desist from various practices, including "[b]illing livestock at other than the true and actual weight" (CX 3, p. 12), and requiring Spencer to "keep accounts, records and memoranda which fully and correctly disclose all transactions involved in its business as . . . a market agency buying on commission" (CX 3, p. 13). Although Spencer neither admitted nor denied the allegations of the complaint, Mike Donaldson consented "to the issuance of a specified order containing findings of fact and conclusions based upon the allegations of the Amended Complaint" (CX 3, pp. 15, 18). The findings state that Mike Donaldson was president and principal owner of Spencer Livestock Commission Company (CX 3, p. 3). The findings relate to numerous violations, several of which are similar to those involved here. For example, two of the findings are as follows (CX 3, pp. 4-6):

> 5. On or about January 28, 1975, responde[nt]
> from consignment in connection with its operatio[n]
> agency in commerce, 50 head of livestock
> Klaveano Ranches, Inc., Pomery, Washington, o

[49] If respondents had been acting as a speculative dealer, not in an agency capacity, they could lawfully have charged whatever the traffic would bear, but they would still have committed weight violations by failing to pass along the shrink at which the livestock was purchased. *In re Collier*, 38 Agric. Dec. 957, 967-70 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished). For a discussion of buying and selling livestock with "pencil shrink," see *In re Saylor*, 44 Agric. Dec. ____, slip op. at 270-73 (Sept. 20, 1985) (decision on remand, and Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, Agricultural Law 231, 272 (1981).

sion basis. Respondent used the same 50 head lot of livestock to fill an off market bid on purchase order on the same date at a $1 a cwt. increase in price, without remitting to the consignor the additional sales amount. Nor did respondent reveal in its billing to the buyer that it owned the livestock, or that the billed price was $1 a cwt. greater than the true purchase price. In addition, respondent failed to show in its accounting to the consignor that it was the buyer, and instead showed Harry Robinson as the buyer.

. . . .

8. On or about the second half of February 1975, Donovan L. Heckman of Whitebird, Idaho, ordered 200 to 300 steers from respondent. On March 22, 1975, respondent purchased 80 head of steers from the Intermountain Cattle Company weighing 49,010 lbs. less a 3% shrink of 1,470 lbs., for a net pay weight of 47,540 lbs. at $30.50 per hundredweight for a total cost to respondent of $14,499.70. In billing Heckman for the 80 steers, which were used to fill part of the Heckman order, respondent billed Heckman at a net purchase weight of 48,024 lbs. at $30.75 a cwt., for a total purchase price to Heckman of $14,767.38. The respondent did not account to Heckman as to any buying commissions on the livestock, nor did it account to Heckman on the basis of the respondent's purchase weights or prices.

On June 4, 1979, Mike Donaldson was fined $5,000 and put on 3 years' probation based upon a guilty verdict for making false and fictitious entries in billing invoices required to be kept under the Packers and Stockyards Act and mail fraud (CX 4, p. 1), all based on falsely increasing weights in livestock transactions (CX 4, pp. 8–44). Count 11, which is typical of the nine counts involving false weights in billing invoices under the Packers and Stockyards Act upon which Mike Donaldson was found guilty, is as follows (CX 4, p. 18):

<u>COUNT 11</u>

(Vio. 7 USC §222; 15 USC § 50 and 18 USC § 2)

That on or about September 11, 1975, at Lewiston, within the State and District of Idaho, MIKE DONALDSON, Defendant and Owner, Spencer Livestock Commission Company, said person and entity subject to the "Packers and Stockyards Act," did willfully cause to be made, a false and fictitious entry in a billing invoice, a record kept, and required to be kept under the "Act," in that on billing invoice dated September 11, 1975, to Central Livestock Order Buyers, aka, CLOB, a cattle buyer, the net weight of 667 head of cattle was shown as 439,170 pounds, when in truth and in fact, as MIKE DONALDSON well knew said net weight was false and fictitious; all in violation of 7 United States Code, Section 222 and 15 United States Code, Section 50, and 18 United States Code, Section 2(b)

Count 12, which is typical of the seven mail fraud counts upon which Mike Donaldson was convicted, is as follows (CX 4, pp. 19–20):

COUNT 12

(Vio. 18 USC § 1341 and 18 USC § 2)

1. That beginning on or about July 14, 1975, and continuing through on or about November 30, 1975, and at times unknown to the Grand Jury, at Lewiston, within the State and District of Idaho, Defendant MIKE DONALDSON, in the sale of cattle by Spencer Livestock Commission to Central Livestock Order Buyers, aka CLOB, did willfully with intent to defraud and deceive CLOB, devise a scheme and artifice to defraud, deceive and obtain money and property by means of false and fraudulent pretenses, and representations and furnish for unlawful use, false obligations and articles, for the purpose of executing said scheme and artifice to defraud and attempting to do so.

2. That it was a part of the scheme and artifice to defraud and deceive that Spencer Livestock Commission, an entity owned or controlled by MIKE DONALDSON would purchase cattle for ultimate sale and shipment to CLOB.

3. That it was a part of the scheme and artifice to defraud and deceive in the sale of cattle to CLOB, that Spencer Livestock Commission would charge CLOB, as MIKE DONALDSON well knew, for falsely increased weights on cattle purchased on a weight basis by CLOB.

4. That it was a part of the scheme and artifice to defraud and deceive in the sale of cattle to CLOB as MIKE DONALDSON well knew, that Spencer Livestock Commission would cause sight drafts to be presented for payment by CLOB for falsely increased weight.

5. That it was a further part of the scheme and artifice to defraud and deceive CLOB that Spencer Livestock Commission did cause the United States mails to be used in furtherance of said scheme, namely, that a sight draft would be and was mailed to Northwestern National Bank, South St. Paul, Minnesota, for payment by CLOB to Spencer Livestock Commission.

6. That it was a part of the scheme and artifice to defraud, deceive and to obtain money and property by means of a false and fraudulent pretense and representation and to furnish for unlawful use, a false obligation and article that MIKE DONALDSON caused a sight draft dated September 11, 1975, in the amount of $143,004.06 (dollars)bearing the weight of 439,170 pounds which weight was falsely increased as MIKE DONALDSON well knew, to be mailed as heretofore stated for payment by CLOB to Spencer Livestock Commission, an entity owned or controlled by MIKE DONALDSON; all in violation of Title 18, United States Code, Section 1341 and Section 2(b).

On December 8, 1980, in a consent order, Mike Donaldson and Mountain States Cattle Company, of which Mike Donaldson was alleg.

edly vice president, 20% owner, and responsible for its direction, management and control (CX 5, p. 7), were suspended as registrants under the Act for 1 year, 7 months of which was held in abeyance. Mountain States and Mike Donaldson were ordered to cease and desist from (CX 6, pp. 3–4):

> (1) Engaging in any act, practice or course of business for the purpose of obtaining money from the purchasers of livestock by false or deceptive pretenses, or which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of livestock;
>
> . . . .
>
> (3) Misrepresenting, directly or indirectly, to the purchasers of livestock, . . . the actual weights at which respondents purchased such livestock, [or] respondents' actual purchase prices for such livestock . . .;
>
> . . . .
>
> (5) Collecting payment from the purchasers of livestock on the basis of false or inaccurate weight entries on accounts of purchase, invoices, or billings, ...

Mike Donaldson and Mountain States were ordered to keep detailed records as to their livestock transactions as follows (CX 6, pp. 4–5):

> Respondents Mountain States and Donaldson shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in their businesses subject to the Packers and Stockyards Act, including but not limited to:
>
> (1) Complete and accurate copies of invoices, accounts and bills for all livestock purchased;
>
> (2) Scale tickets for all livestock purchased on a weight basis;
>
> (3) Complete and accurate copies of invoices, accounts and bills for all livestock sold;
>
> (4) Scale tickets for all livestock sold on a weight basis;
>
> (5) Deposit slips, bank statements, cancelled checks and drafts, and check stubs;
>
> (6) Way-bills and truckers tickets,
>
> (7) [illegible]ate record of the number and weights of live- [illegible] or otherwise disposed of each business day, [illegible] received therefor, and the charges, if any, [illegible] other services rendered; and
>
> [illegible]ccurate copies of all livestock purchase

Although Mike Donaldson neither admitted nor denied the allegations of the complaint in the two prior administrative proceedings, his failure to deny the allegations gives rise to an adverse inference against the respondents in those cases. *In re King Meat Co.*, 40 Agric. Dec. 1468, 1505-06 (1981), *aff'd*, CV 81-6485 (C.D. Cal. Aug. 11, 1983) (reinstating *nunc pro tunc* original order of Oct. 20, 1982, *aff'g* 40 Agric. Dec. 1468), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished). As stated in *King Meat*, *supra*, 40 Agric. Dec. at 1505-06:

> Moreover, even though Mr. Faello knew that it is a serious offense to remove the yield grade designations without substantial trimming (Tr. 872), when respondent was accused by Mr. Swingley of having shipped the entire 100 arm chucks without substantial trimming, Mr. Faello did not "make any pronouncement to Mr. Swingley in disagreement" with his conclusions (Finding 11(g); Tr. 876). It is a familiar principle that if a party's interest is jeopardized by an accusation made by such a person that naturally calls for contradiction, if he can do so with truth, and he does not contradict it when it is made, a presumption or inference is created against him, which is more or less strong in proportion to the inducement to make the denial. 4 Wigmore, *Evidence* §§ 1071-72 (Chadbourn rev. 1972).
>
> "Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted. 3A J. Wigmore, Evidence < 1042, p. 1056 (Chadbourn rev. 1970)." *Jenkins* v. *Anderson*, 447 U.S. 231, 239 (1980); and *see* *Vajtauer* v. *Comm'r. of Immigration*, 273 U.S. 103, 111-13 (1927); *Bilokumsky* v. *Tod*, 263 U.S. 149, 153-55 (1923); *United States* v. *Moore*, 522 F.2d 1068, 1075-76 (9th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976). As stated in *United States* v. *Hale*, 422 U.S. 171, 176 (1975):
>
>> Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation. Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question. 3A Wigmore § 1042.
>
> In this case, Mr. Faello's inducement to make exceptionally great since a serious accusation was head of meat grading in the area, and responder ing under a consent decree which could resu drawal of grading and acceptance services for section IV below). [Footnote omitted.]

Similarly, in the present case, Mike Donaldsor make a denial of the accusations of the complaints great since his failure to deny the allegations result 1-year (with 7 months suspended) registration susp

However, even if we were to assume that the respondents in the two prior administrative cases had not committed the violations alleged in the complaints, and that they consented to go out of the livestock business for 21 days and later for 5 months even though they were completely innocent of the charges, nonetheless, the fact that they suffered the administrative sanctions imposed in those cases, and were ordered in both cases to cease and desist from engaging in such practices in the future, should have been enough to deter the present violations. It did not!

Moreover, one would normally expect that a $5,000 criminal fine and a 3-year probationary sentence would have deterred Mike Donaldson from committing similar violations *at least during the probationary period*. However, the criminal fine and probationary period were not sufficient punishment to deter Mike Donaldson from committing the same type of violations *during his probationary period*.

Accordingly, it is clear that respondent Mike Donaldson and his commission firm, Spencer Livestock Commission Co., are completely corrupt in their livestock dealings. Nothing but the strongest possible sanction could have even the slightest possibility of deterring them from committing future, similar violations. Considering the three prior actions against respondents for similar violations, the 10-year suspension period recommended by complainant is a "reasonable specified period" (7 U.S.C. < 204) for the 17 serious violations proven here in which respondents breached their fiduciary obligation, cheating their principals out of about $40,000 in 17 transactions (§ XI(B)-(C), *infra*).

B. Respondents' Willful, Flagrant and Repeated Violations Warrant a 10-Year Suspension Order.

Respondents' violations in this case were exceptionally flagrant. Mr. Harold W. Davis, Director, Livestock Marketing Division, Packers and Stockyards Administration, testified that defrauding principals in fiduciary transactions is one of the most serious violations that can be committed under the Act. [50] He explained in detail the basis for the administrative recommendation for a 10-year suspension order. (Tr. 550-71). Respondents' price-increase and weight-increase violations in the 17 fiduciary transactions involved here are summarized in the table set forth on the following page.

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[50] See cases cited in note 57, *infra*.

SUMMARY OF RESPONDENTS' VIOLATIONS

Customer	Record Reference	No. of Head	Weight (Cwt.)	Respondents' Commission 50¢/Cwt.	Price Increase Over Commission	Weight Increase Over Purchase Weight (Pounds)
1. Monson	CX 8, p. 1	144	1,526.05	$ 763.03	$2,282.02	
2. "	CX 12, p. 1	48	445.85	222.93	—	707
3. "	CX 12, p. 1	318 (317)	2,571.65	1,285.83	3,525.31	
4. "	CX 16, p. 1	75	541.50	270.75	170.83	
5. "	CX 20, p. 1	226	1,545.67	772.84	2,409.62	
6. Van de Graaf	CX 25, p. 1	272	2,704.57	1,352.29	1,525.10	
7. "	CX 29, pp. 1-2	585	6,389.01	3,194.51	5,018.25 (On 534 Head)	
8. "	CX 33, p. 1	98	880.71	440.36	773.19	
9. "	CX 37, p. 1	222	2,055.94	1,027.97	3,383.42	
10. "	CX 69, p. 1	311 (310)	2,447.69	1,223.85	—	5,109
11. Schaake	CX 41, p. 1	144	1,516.01	758.01	924.08	
12. "	CX 45, p. 1	46	495.60	247.80	492.72	
13. "	CX 49, p. 1	133	1,458.23	729.12	—	2,315
14. "	CX 53, p. 1	172	1,270.15	635.08	5,885.83	
15. "	CX 57, p. 1	73	558.15	279.08	751.75	
16. "	CX 61, p. 1	277	2,309.12	1,154.56	6,702.26	
17. "	CX 65, p. 1	217	1,495.74	747.87	805.76	
Total		3,361		$15,105.88	$34,649.64	8,131

As shown in the table, respondents' 50c per cwt commissions in the 17 transactions totaled $15,105.88. On top of that, respondents cheated their principals out of an additional $34,649.64 through price increases, and about $5,000 more through weight increases (8,131 pounds). These violations were willful, repeated and exceptionally flagrant.

Respondents contend that the net price or cost of the cattle to Schaake, Monson and Van de Graaf was, in each transaction, significantly below the then prevailing market (Appeal Brief at 40). Even if true,[51] that fact would be irrelevant. An agent who secretly increases the weights and prices of livestock purchased on a commission basis for principals commits very serious violations of the Act even if the invoice prices to the principals are at or below the market. By way of analogy, a lawyer who consistently embezzles funds from estates he is handling (in amounts over twice as great as the fees he is charging) commits serious violations of the Code of Ethics warranting disbarment even if his total compensation (consisting of fees and embezzled funds) is less than prevailing legal charges in the area.

Although the feeders felt that the livestock purchased by respondents for them was in line with the range of prevailing market prices (Tr. 257-58, 262-63, 350-52, 395-96), nonetheless, at times, they were dissatisfied with respondents' weights and prices (Tr. 233, 257-58, 298-300, 305, 397-98, 400-01, 808).[52] In addition, it is very difficult even for an experienced feedlot operator to determine how particular livestock purchased for him by an agent compare with the livestock which formed the basis for market news reports. Feeder

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[51] Complainant correctly did not bother to refute respondents' evidence that the net cost to the principals was below the prevailing market. However, the best way to determine the *fair market value* of the livestock is to add respondents' costs (respondent presumably paid fair market value for the cattle in Canada), respondents' expenses (all of respondents' expenses were accepted by complainant as proper), and respondents' 50c per cwt commission (50c per cwt was the maximum rate for similar services, § II(A)(1), II(B)(1), II(C)(1), *supra*). Respondents' charged $34,649.64 more than that in the 17 transactions at issue here, and billed the principals for 8,131 pounds of extra weight (see the table).

[52] Mr. Van de Graaf testified that he was so dissatisfied with respondents' accountings that he held back about $16,000 on the last amount owed to respondents (Tr. 309). His testimony in this respect, which is challenged by respondents, is supported by documentary evidence. Specifically, Van de Graaf's final sight draft for the Canadian transactions for $14,420.38 is dated April 19, 1983 (CX 72, p. 5), but the notation on the bottom left-hand corner of that exhibit, made by complainant's investigator, Mr. Kienow (Tr. 149-50), shows that the check had not cleared as of the week of "5-17-82," i.e., about a month after the check had been issued.

cattle are not homogenous animals. Notwithstanding the best efforts of the Department to describe feeder livestock, the descriptive system is far from perfect, making it impossible even for an experienced feedlot operator to compare in a precise manner the prices of livestock purchased for him and those described in market news reports (D. Petritz, S. Erickson, & J. Armstrong, *The Cattle and Beef Industry in the United States: Buying, Selling, Pricing* 80–85, 95–103, 416–17 (Cooperative Extension Service Paper 93, July 1982).

Moreover, the feeders testified that respondents were buying the livestock involved here on a 50c per cwt commission basis, and that they expected respondents' invoices to be based on respondents' purchase weights and prices (§ II, *supra*). Hence respondents' arbitrary increases in prices and weights in the 17 transactions found here violated the express agreements between the parties, and also violated respondents' fiduciary duty to their principals. Respondent Donaldson admitted that "any individual, myself included," wants to buy livestock as cheaply as he can. He testified (Tr. 821–22):

> THE WITNESS: As a rule, when you are selling cattle, the majority of people think or tend to believe that you are only charging or only making 50 cents a hundred. If somebody had that in their mind, I would do nothing to change their mind or make it be known otherwise. Its general practice -- if somebody thinks your making more than -- I will use Don Schaake as an instance because I have sold him lots of dealer cattle over the years and sold him cattle that I have marked up substantially, and some cattle at a loss.
>
> If Don thinks that I have got a dollar or two made, he will pry on you and work on you in every way he can to get you to take off some money.
>
> If he knows you don't have anything on him, in fact he has been very generous to me at times when I was losing on cattle, he has given me more than he had to but in the same token, if he thinks there is more, he will try to take it away.
>
> JUDGE WEBER: But earlier you had an expert testify that they don't really care what you have got in it or what you are getting out of it. If I understood the experts' testimony, they're only interested in the price they pay at the fror
>
> Doesn't that conflict with what you were jus
>
> THE WITNESS: What I am saying is, ar included, when somebody prices somethir can, I will try to buy it cheaper.
>
> . . . .
>
> THE WITNESS: I think that

The desire of the feeders t not inconsistent with their tes..

in the cost of the cattle delivered to them in the feedlots. Furthermore even if the three feeders had been entirely satisfied with respondents fraudulent activities, that would not have reduced the sanction here As stated in *In re Saylor*, 44 Agric. Dec. ____, slip op. at 496 (Sept 20,1985) (decision on remand):

> But even if respondent's customers had remained satisfied if they had known all of the relevant facts, it is well settled under this Department's sanction policy that the sanction would not be reduced for that reason. See *In re Steinberg Bros. Co.*, 43 Agric. Dec. ____ (Dec. 26, 1984); *In re Bosma*, 41 Agric. Dec. 1742, 1754 (1982) (satisfaction of farmers for whom auction market sold livestock did not negate a violation of Packers and Stockyards Act and regulations by auction market), *aff'd in part and rev'd in part on other grounds*, 754 F.2d 804 (9th Cir. 1984); *In re Louvier*, 19 Agric. Dec. 1427, 1439 (1960) ("It is not a defense to these violations to say that respondent's principals or customers are satisfied with his services. The test is whether respondent [a livestock order buyer] complied with the act . . .").

Respondents waste five pages of their brief on appeal (10% of the brief) arguing the absurd proposition that even if respondents violated the Act as found by the ALJ, nonetheless, the violations were not serious because the Act is concerned only with safeguarding sellers, protecting consumers, and protecting the industry from unfair practices *of competitors* (Appeal Brief at 38-43). In support of their argument respondents quote two sentences from the legislative history of the 1958 amendments to the Act. However, the sentence immediately preceding that quoted by respondents destroys respondents' argument The legislative history relied on by respondents, including the first two sentences of the paragraph omitted by respondents, is as follows (H.R Rep. No. 1048, 85th Cong., 1st Sess. 1 (1957), *reprinted in* 1958 U.S Code Cong. & Ad. News 5212, 5213; emphasis supplied):

> PRINCIPAL PROVISIONS OF THE ACT
>
> The Packers and Stockyards Act was enacted by Congress in 1921. *The primary purpose of this Act is to assure fair competition and fair trade practices in livestock marketing* and in the meatpacking industry. The objective is to safeguard farmers and ranchers against receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats, poultry, etc. Protection is also provided to members of the livestock marketing and meat industries from unfair, deceptive, unjustly discriminatory, and monopolistic practices of competitors, large or small.

Hence the "primary purpose" of the Act is to assure not only fair competition, but, also, "fair trade practices in livestock marketing" and meat packing. Accordingly, when a fiduciary buying livestock on a

commission basis defrauds his principals with respect to prices and weights, the violations defeat the "primary purpose" of the Act. [53]

The broad scope of the Packers and Stockyards Act was recognized in 1921 as follows (H.R. Rep. No. 77, 67th Cong., 1st Sess. 2 (1921)):

> A careful study of the bill, will, I am sure, convince one that it, and existing laws, give the Secretary of Agriculture complete inquisitorial, visitorial [sic], supervisory, and regulatory power over the packers, stockyards and all activities connected therewith; that it is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.

Furthermore, Congress has repeatedly broadened the Secretary's regulatory authority under the Act. In 1924, the Act was broadened to authorize the Secretary to suspend registrants and require bonds of registrants (Act of June 5, 1924, Pub. L. No. 201, 43 Stat. 460, codified at 7 U.S.C. § 204). The Act was broadened to cover live poultry dealers or handlers in 1935 (Act of Aug. 14, 1935, Pub. L. No. 272, § 503, 49 Stat. 649, codified at 7 U.S.C. §§ 192, 218b, 221, 223). In 1958, the Act was broadened to give the Secretary "jurisdiction over all livestock marketing involved in interstate commerce including country buying of livestock and auction markets, regardless of size" (H.R. Rep. No. 1048, 85th Cong., 1st Sess. 5 (1957), *reprinted in* 1958 U.S. Code Cong. & Ad. News 5212, 5216). In 1976, the Act was broadened to authorize packer-bonding, temporary injunctions, and civil penalties; to require prompt payment of packers, market agencies, and dealers; and to eliminate the requirement that the Secretary prove that each violation occurred "in commerce" (Act of Sept. 13, 1976, Pub. L. No. 94-410, 90 Stat. 1249).

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[53] Although some cases hold that certain types of violations of the Act require proof of predatory intent or proof that the practice is likely to result in injury to competition (e.g., *Armour & Co.* v. *United States*, 402 F.2d 712, 712-23 (7th Cir. 1968)), other cases recognize that other types of violations require proof (e.g., *Bosma* v. *USDA*, 754 F.2d 804, 809 (9th Cir. 1984) (fai
tion operator to inform consignors that he was the actual pu
stock is "inherently unfair," and "it may be considered ar
practice absent a more specific showing of actual harm")
Co., 580 F. Supp. 1465, 1469-70 (NDNY 1984) (< 202(
"unfair" or "deceptive" practices by packers does
competition; it is sufficient to show that cattle we
State Meat Co., 45 Agric. Dec. ____, slip on
ITT Continental Baking Co., 44 Agric. D
1985) (remand order), *final order*, 44 Agri
order); *In re Farrow*, 42 Agric. Dec. 13
rev'd in part, 760 F.2d 211 (8th Cir. 1985,
reversed).

From the foregoing, it is clear that Congress has, over the years, recognized the need to assure fair trade practices in the livestock marketing industry in view of the nature of the industry and its importance to the national economy. Any commission buyer who defrauds principals in fiduciary transactions has committed one of the most serious violations that can be committed under the Act.

The Act authorizes the Secretary to suspend a registrant "for a reasonable specified period" (7 U.S.C. § 204). The suspension authority was included as a rider to the Department of Agriculture's Appropriation Act for fiscal 1925 (Act of June 5, 1924, Pub. L. No. 201, 43 Stat. 460, codified at 7 U.S.C. § 204). A similar rider was included each year until the provision was made permanent law by adding "hereafter" to the Department's Appropriation Act for fiscal 1944 (Act of July 12, 1943, Pub. L. No. 129, 57 Stat. 422; *see Cella* v. *United States*, 208 F.2d 783, 789–90 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954); *Midwest Farmers, Inc.* v. *United States*, 64 F. Supp. 91, 101 (D. Minn. 1945) (3-judge ct.)).

There is no specific limit imposed by Congress as to the suspension period, other than the standard of reasonableness. Where Congress has not imposed any maximum limit on the suspension period, other than the standard of reasonableness, no maximum limit should be imposed by interpretation. *See United States* v. *Cooper Corp.*, 312 U.S. 600, 605 (1941).[64]

In addition, we should presume that when Congress added the authority in 1924 to suspend a registrant for a "reasonable specified period," Congress intended the authority to be construed broadly enough to achieve the congressional purpose to assure fair competition and fair trade practices in the livestock industry. A "reasonable specified period" is whatever period it takes to achieve the congressional purpose, considering the nature of the violations, the number of violations, and the past history of the violator.

I know from experience that different persons can have widely divergent views as to what suspension period is "reasonable" in particular circumstances. When I was Administrator of the Packers and Stockyards Administration, I engaged in many discussions with all of the agency's Washington staff and Regional Supervisors, and many industry leaders throughout the country, relating to the suspension periods that should be recommended for particular types of violations. My recom-

[64] The statement at the outset of this decision that the 10-year suspension period imposed here tests the outer limits of the Department's suspension authority is not based on statutory interpretation, but, rather, on the fact that in more than 60 years of administering the suspension authority, no greater suspension period has been imposed.

mendation in particular cases was based on my own viewpoint arrived at after considering all of the widely divergent viewpoints of others. I presume that the present Administrator similarly considers many viewpoints before arriving at a particular recommendation.

Since the views of administrative officials and industry leaders vary widely as to what suspension period is "reasonable" for a particular type of violation, it can be expected that the same diversity of viewpoint will be found among the reviewing judges throughout the country. By way of analogy, it is well recognized that the sentences by judges in criminal proceedings vary widely, in identical situations, e.g., ranging from 3 years to 20 years imprisonment. As stated in the legislative history of the recent sentencing-reform legislation (S. Rep. No. 225, 98th Cong., 2d Sess. 38, 41, 44-45, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3221, 3224, 3227-28 (footnotes omitted)):

> [E]very day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. One offender may receive a sentence of probation, while another--convicted of the very same crime and possessing a comparable criminal history--may be sentenced to a lengthy term of imprisonment. . . .
>
> . . . .
>
> 2. Disparity and uncertainty in current Federal sentencing
>
> a. Practices of the Federal judiciary
>
> The absence of a comprehensive Federal sentencing law and of statutory guidance on how to select the appropriate sentencing option creates inevitable disparity in the sentences which courts impose on similarly situated defendants. [18] This occurs in sentences handed down by judges in the same district and by judges from different districts and circuits in the Federal system. [19] One judge may impose a relatively long prison term to rehabilitate or incapacitate the offender. Another judge, under similar circumstances, may sentence the defendant to a shorter prison term simply to punish him, or the judge may opt for the imposition of a term of probation in order to rehabilitate him. [20]
>
> . . . Similar discrepancies in Federal sentences for a number of different offenses were found in a landmark study by the United States Attorney's Office for the Southern District of New York. [21] Further probative evidence may be derived from another 1974 study in which fifty Federal district court judges from the Second Circuit were given twenty identical files drawn from actual cases and were asked to indicate what sentence they would impose on each defendant. [22] The variations in the judges' proposed sentences in each case were astounding, as shown in the following chart:
>
> . . . .

In one extortion case, for example [in the study referred to in the preceding paragraph], the range of sentences varied from twenty years imprisonment and a $65,000 fine to three years imprisonment and no fine. [23]

The findings of the Second Circuit study have been reconfirmed in a study performed for the Department of Justice in which 208 active Federal judges specified the sentences they would impose in 16 hypothetical cases, 8 bank robbery cases, and 8 fraud cases. In only 3 of the 16 cases was there a unanimous agreement to impose a prison term. Even where most judges agreed that a prison term was appropriate, there was a substantial variation in the lengths of prison terms recommended. [24] In one fraud case in which the mean prison term was 8.5 years, the longest term was life in prison. In another case the mean prison term was 1.1 years, yet the longest prison term recommended was 15 years. [25]

The study also concluded that, while 45 percent of the variance in sentences for hypothetical cases was attributable to differences in offense and offender characteristics, 21 percent was directly attributable to the fact that some judges tend to give generally tough or generally lenient sentences, [26] 22 percent of the variation was attributable to interactions between the "judge factor" and other factors. For example, some judges sentence more harshly for a particularly offense than other judges even though they do not sentence more harshly overall, and some judges sentence relatively more harshly than other judges if the defendant has a prior record. [27]

. . . .

In addition, as indicated in the following chart, a study of the two districts in each of the 11 Federal judicial circuits that sentenced the greatest number of offenders in 1972 for a selected group of offenses shows widespread sentencing disparity:

. . . .

The Committee finds that this research makes clear that variation in offense and offender characteristics does not account for most of the disparity. [28]

If reviewing courts throughout the country were free to hold that any suspension period imposed by the Judicial Officer is not "reasonable" if it exceeds (or exceeds by a substantial amount) that which the reviewing court would have imposed, it will destroy not only the desired nationwide uniformity, but, also, at times, important regulatory programs (due to the court's lack of familiarity with the total administrative program).

For example, in *Glover Livestock Comm'n Co.* v. *Hardin*, 454 F.2d 109 (8th Cir. 1972), *rev'd*, 411 U.S. 182 (1973), the Eighth Circuit set aside as "unconscionable" (454 F.2d at 115) a 20-day suspension or-

der issued against an auction market for short weighing livestock on February 25, 1969, after the auction had been warned about prior short weighing in 1966 and 1967. If the Eighth Circuit's decision had not been reversed, it would have totally destroyed the agency's check-weighing program throughout the country. In fact, if the Secretary could issue no more than a cease and desist order when false weighing was detected after two prior warning letters, it would have been prudent for the agency to completely discontinue any effort at check weighing, using the agency's limited money and manpower in other areas. Registrants under the Packers and Stockyards Act fear a cease and desist order about as much as they would fear a slap across the face with a wet noodle! The Eighth Circuit's decision, if not reversed, would have made it cost-effective to run the risk of a cease and desist order for short weighing. And when short weighing is practiced by one auction market in anarea, it attracts volume from other markets, which leads to short weighing by other markets in the area to hold their volume. [65]

I am confident that the Eighth Circuit had no idea that its decision would totally destroy the agency's check-weighing program. It had little knowledge of the weighing problem in the livestock industry (see *In re Muehlenthaler*, 37 Agric. Dec. 313, 331-32, 353-69, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978)), and the Department's check-weighing program. It is quite likely that the court was aware of only "four [prior] decisions of the Secretary in which suspensions of registration [were] imposed for short-weighing consigned cattle" (454 F.2d at 114). As a matter of fact, suspension orders in short-weighing cases had previously been issued by the Judicial Officer in 148 cases during the prior 25 years, with suspension periods of 5 years (1 case), 4 years (2 cases), 3 years (6 cases), 30 months (1 case), 2 years (6 cases), 20 months (1 case), 18 months (6 cases), 16 months (2 cases), 15 months (2 cases), and 1 year (15 cases). Hence prior suspension orders of a year or longer had previously been issued for short weighing in 42 cases by the Judicial Officer during the 25-year period preceding *Glover*. A table listing the suspension periods imposed for false weighing or causing false weighing of livestock from 1950 to January 1974 is set forth in *In re Worsley*, 33 Agric. Dec. 1547, 1584-92 (1974). The table is

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[65] *In re Muehlenthaler*, 37 Agric. Dec. 313, 321, *aff'd* [illegible] Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. [illegible] *per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); [illegible] Dec. 1087, 1095 n.5 (1977); *In re Townsend*, 35 Agric. Dec. 1604, 1622 (1976); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1819 (1975); *In re Worsley*, 33 Agric. Dec. 1547, 1577 n.24 (1974); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 526 n.24 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Speight*, 33 Agric. Dec. 280, 317 n.24 (1974).

summarized in the decision in that case (*id.* at 1576). The maximum suspension for short weighing was 5 years, the average 245 days and the median 90 days (*id.* at 1575–76). All but the last 12 of the 160 cases listed in the table were decided by the Judicial Officer prior to the Eighth Circuit's decision in *Glover*.

We do not know whether the Eighth Circuit would still have regarded the 20-day suspension in *Glover* as "unconscionable" if it had known of the 148 prior cases during the preceding 25 years in which the median suspension period was about 90 days. Presumably, the Department's appellate attorneys regarded the citation of four prior precedents involving 30-day suspension orders as sufficient to support the 20-day suspension order involved in *Glover*. (It is not feasible within the limited confines of an appellate brief to fully educate each reviewing court as to the totality of facts bearing on an administrative sanction).

If the congressional purpose of this remedial legislation is to be achieved, and if any degree of national uniformity in sanctions is to be achieved, reviewing courts must not determine whether an administratively imposed suspension period is "reasonable" based on what suspension period they would have imposed. Rather, they should reverse only if the administrative sanction fails to meet the standards of the Administrative Procedure Act, i.e., if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. § 706(2)(A)). And it goes without saying that an administrative suspension period that greatly exceeds that which would have been imposed by the reviewing court is not necessarily arbitrary, capricious, or an abuse of discretion.

Respondents contend that the statutory criteria for determining the amount of a civil penalty under the Act (7 U.S.C. § 213(b)) should be read into the suspension provisions in 7 U.S.C. § 204 (Appeal Brief at 48). That same argument was rejected in *In re Saylor*, 44 Agric. Dec. ____, slip op. at 497 (Sept. 20, 1985) (decision on remand), in which it is stated:

> Whether an 8-month suspension order will affect respondent's ability to continue in business as a livestock dealer is irrelevant in this proceeding. In the case of civil penalties imposed under the Act, the statute requires that ability to continue in business be considered (7 U.S.C. § 213(b)) (see § XIX(C), *infra*). However, no such requirement is imposed by Congress with respect to suspension orders (7 U.S.C. § 204). When a provision is carefully included in one section of a statute, and omitted in another section, it should not be implied in the place at which it is omitted. *Lang* v. *Comm'r of Internal Revenue*, 289 U.S. 109, 112 (1933); *Corn Prods. Ref. Co.* v. *Benson*, 232 F.2d 554, 562 (2d Cir. 1956).

It is the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or that are regarded by the administrative officials and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the respondents, but also to other potential violators. The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g.*, *In re Saylor*, 44 Agric. Dec. ____, slip op. at 498–520 (Sept. 20, 1985) (decision on remand), which is set forth with a clarifying change and some expansion in subsection C, *infra*.[56]
Considering respondents' repeated and flagrant violations of their fiduciary obligations in the light of their previous history of similar violations (subsection A, *supra*), the 10–year suspension period recommended by complainant and imposed by the ALJ is "reasonable."

Although the 10–year suspension period imposed here is twice as long as the longest suspension period previously imposed in a litigated case, 10–year sanctions have been imposed in a number of recent consent or default cases. *In re Ozark County Cattle Co.*, 45 Agric. Dec. ____ (Oct. 15, 1986) (consent order) (10–year suspension for failure to pay for livestock and check kiting); *In re Palmer*, 45 Agric. Dec. ____ (June 23, 1986) (default order) (10–year suspension to be re

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[56] Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, *e.g.*, in *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. ____ (Mar. 7, 1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Collier*, 38 Agric. Dec. 957, 971–72 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell–I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362–63 (1978), *aff'd*, No. 78–3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330–32, 337–52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid–States Livestock, Inc.*, 37 Agric. Dec. 547, 549–51 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133–34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978
Catanzaro, 35 Agric Dec. 26, 31–32 (1976), *aff'd*, No. 76–1613 (9th Ci
9, 1977), *printed in* 36 Agric. Dec. 467 (1977); *In re Maine Po*
Inc., 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (
In re M. & H. Produce Co., 34 Agric. Dec. 700, 750, 762 (19
F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S.
Southwest Produce, Inc., 34 Agric. Dec. 160, 171, 178
F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*
145–60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1
Co., 33 Agric. Dec. 1884, 1913–14 (1974), *aff'*
1975); *In re Trenton Livestock, Inc.*, 33 Agric.
aff'd per curiam, 510 F.2d 966 (4th Cir. 1975
Agric. Dec. 53, 64–80, *aff'd per curiam*, 498

duced to 120 days if respondent makes full payment for $103,962.37 worth of livestock); *In re Corporate Capital Co.*, 45 Agric. Dec. ____ (Jan. 10, 1986) (consent order) (10-year prohibition from operating subject to Act because of failure to pay for livestock, misrepresenting buying commissions and collecting from sellers on the basis of false representations). Consent and default decisions are not regarded as precedents in determining the sanction in litigated cases, but these consent and default cases reflect the administrative determination that 10-year sanctions can, in appropriate circumstances, be reasonable.

In addition, the sanctions imposed under the Packers and Stockyards Act in recent years have been much more severe than during earlier years, *e.g.*, *In re Welch*, 45 Agric. Dec. ____ (Sept. 25, 1986) (decision as to Benson) ($10,000 civil penalty and 1-year prohibition from engaging in business subject to the Act); *In re Garver*, 45 Agric. Dec. ____ (June 19, 1986), *appeal docketed*, No. 86-4081 (6th Cir. Nov. 28, 1986) (2-year suspension); *In re Holiday Food Services, Inc.*, 45 Agric. Dec. ____ (May 8, 1986) ($50,000 civil penalty), *appeal docketed*, No. 86-7332 (9th Cir. June 6, 1986); *In re Corn State Meat Co.*, 45 Agric. Dec. ____ (May 8, 1986) ($50,000 civil penalty); *In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. ____ (Mar. 7, 1986) (6-month suspension), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. ____ (Feb. 27, 1986) (decision as to Millspaugh) (5-year suspension, but permitting respondent to be employed as an auctioneer after 1 year); *In re Saylor*, 44 Agric. Dec. ____ (Sept. 20, 1985) (decision on remand) (8-month suspension and $10,000 civil penalty); *In re ITT Continental Baking Co.*, 44 Agric. Dec. ____ (Mar. 18, 1985), *final consent decision*, 44 Agric. Dec. ____ (Oct. 24, 1985) ($10,000 civil penalty); *In re Powell*, 44 Agric. Dec. ____ (Mar. 7, 1985) (5-year suspension for failure to pay for livestock), *appeal denied*, 44 Agric. Dec. ____ (May 28, 1985) (appeal not timely filed); *In re Mid-West Veal Distributors*, 43 Agric. Dec. ____ (July 13, 1984) ($77,000 civil penalty, with $27,000 suspended); *In re Mayer*, 43 Agric. Dec. ____ (Apr. 12, 1984) (decision as to Doss) (2-year suspension), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Peterman*, 42 Agric. Dec. ____ (Dec. 12, 1983), *aff'd*, 770 F.2d 888 (10th Cir. 1985) ($20,000 civil penalty).

In *In re Garver, supra*, 45 Agric. Dec. ____, slip op. at 17-21 (June 19, 1986), it is explained that 2-to-5-year suspension orders are now issued in the case of serious failures to pay for livestock where 30-to-60-day suspension orders would have been issued in comparable cases a few years ago.

Respondents' violations are somewhat similar, but even more flagrant, than the violations in *In re Saylor*, 44 Agric. Dec. ____

(Sept. 20, 1985) (decision on remand), in which an 8-month suspension order and a $10,000 civil penalty were imposed for 14 violations in which respondent increased weights unlawfully. Here we have 17 violations cheating principals out of about $40,000, while in *Saylor* we had 14 violations cheating principals and purchasers out of about $10,000. Moreover, in *Saylor* only three of the violations involved a breach of fiduciary obligations, whereas here, all 17 violations involve a breach of fiduciary obligations.

As stated above, violations of a fiduciary duty are regarded as particularly serious violations of the Act. [57] This was emphasized in *In re Harry Klein Produce Corp.*, 46 Agric. Dec. ____, slip op. at 56-57 (Feb. 6, 1987), quoting from *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1732-33 (1978), which, in turn, is quoting from *In re Mandell, Spector, Rudolph Co.*, 24 Agric. Dec. 651, 695-96, 701 (1965), *aff'd sub nom. Mandell, Spector, Rudolph Co.* v. *United States*, 364 F.2d 889 (3d Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967):

> In addition, respondent was operating as a commission merchant or factor in consignment transactions and as a joint venturer in the joint account transaction, in both of which capacities respondent had a *fiduciary* duty to account truly and correctly, to keep adequate and accurate records identifying individual shipments of produce, to remit funds owing and not to commingle the goods of its principals or partners with its own or that of others. It is axiomatic that in this position of trust and confidence discrepancies or confusions created by respondent are to be resolved against it. * * *
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> * * *
>
> In determining the sanction to be imposed herein, it must be kept in mind that the major violations of the act found herein, that is, the violations of section 2(4) thereof, are, in our opinion, the most serious and flagrant type possible under the act. Such violations involve breaches of fiduciary duty by an agent to his principal and by a joint account partner to his joint venturer. The relationship of respondent to the shippers here was one of trust and confidence calling for a high degree of care, honesty and loyalty to the consignors and joint venturers.

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[57] *Midwest Farmers, Inc.* v. *United States*, ;64 F. Supp. 91, 94-102 (D. Minn. 1945) (3-judge court); *In re Welch*, 45 Agric. Dec. ____, slip op. at 26-27 (Sept. 25, 1986); *In re Saylor*, 44 Agric. Dec. ____, slip op. at 185 (Sept. 20, 1985) (decision on remand); *In re Bosma*, 41 Agric. Dec. 1742, 1744, 1751-54 (1982), *aff'd in part & rev'd in part*, 754 F.2d 804 (9th Cir.1984); *In re Sterling Colo. Beef Co.*, 39 Agric. Dec. 184, 211-12 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re Collier*, 38 Agric. Dec. 957 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gus Z. Lancaster Stock Yards, Inc.*, 38 Agric. Dec. 824, 829 (1979)

The sanction here should also be much more severe than the sanction in *Saylor* because Saylor had not previously been involved in any violations under the Act, but respondents have been involved in two prior administrative proceedings and one criminal proceeding for similar types of offenses, and the violations here were committed during the criminal probationary period.

Respondents were well aware of the fact that it is unlawful to increase prices and weights when buying livestock on commission for principals, in view of the three prior actions against them for the same general type of offenses (§ XI(A), *supra*). Respondent Donaldson testified that he did not know that the Packers and Stockyards Administration had jurisdiction of his activities in Canada, based on a telephone conversation with Mr. Paul E. Marone, complainant's Regional Supervisor at Portland, Oregon, and Mr. Robert A. Ellard, associate manager of a livestock marketing trade association (Tr. 68-78, 789-90). But the trade association associate manager did not know that respondents were planning to bring the livestock into the United States (Tr. 750-51, 753-56), and complainant's Regional Supervisor, Mr. Marone, testified that he told Mike Donaldson that complainant has jurisdiction over his activities if he buys livestock in Canada and ships them to the United States. Mr. Marone testified (Tr. 540-41):

Q. Mr. Marone, do you recall receiving a telephone call from Mr. Donaldson in approximately April of 1982?

A. Yes, sir.

Q. What did Mr. Donaldson ask you when he made that telephone call?

A. Mr. Donaldson asked me if we had jurisdiction over Canadian cattle.

Q. What was your response to that question?

A. My response was we do not have jurisdiction in Canada on purchases and sales made in Canada by Canadian citizens.

Q. Did Mr. Donaldson ask you anything else?

A. Yes. He asked me if I was buying cattle in Canada and shipping them to the United States, would we have jurisdiction.

Q. You just stated, and I quote, "if I was buying cattle".

A. Yes sir

to by "I"?

u if he was buying cattle?

A. Yes, sir.

Q. What was your response?

A. I said, "Mike, we have jurisdiction over you and your operation."

The ALJ, who saw and heard the witnesses testify, resolved the conflict in the testimony against respondents. He found (Initial Decision at 25):

> 14. No one in an authority or industry position ever told respondent Mike Donaldson that Canadian purchases of cattle for reshipment to the United States buyers were outside of the jurisdiction of the Packers and Stockyards Act.

Accordingly, it is clear that respondents knowingly violated the Act when they increased prices and weights in the commission transactions involved here. But even if respondents had not known that their conduct was unlawful, "ignorance of the law is never an excuse or even a mitigating circumstance in a disciplinary proceeding" before this Department because:

> If ignorance of the law were a mitigating circumstance, it would be a disincentive to licensees becoming familiar with the regulatory requirements under the Act, which would tend to thwart the purpose of this remedial legislation [i.e., the Perishable Agricultural Commodities Act].

In re Steinberg Bros. Co., 43 Agric. Dec. ____, slip op. at 21 (Dec. 26, 1984); *accord In re Carter*, 46 Agric. Dec. ____, slip op. at 14 (Mar. 3, 1987).

C. U.S.D.A. Sanction Policy.

It is the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or that are regarded by the administrative officials and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the respondents but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings since 1971 or 1972.

> There is a point in the history of society when it becomes so pathologically soft and tender that among other things it sides even with those who harm it, criminals, and does this quite seriously and honestly. Punishing somehow seems unfair to it, and it is certain that imagining "punishment" and "being supposed to punish" hurts it, arouses fear in it. "Is it not enough to render him *undangerous*? Why still punish? Punishing itself is terrible." [59]

Similarly, in administering regulatory programs, there is a danger that the agency may become so "pathologically soft and tender" that it fails to achieve the purpose of the legislators who enacted the remedial statutes.

Since the Department of Agriculture administers approximately 50 regulatory statutes--more than any other agency--it is important that the Department administer the statutes in a manner to achieve the Congressional purposes.

The administrative proceeding in this case does not partake of the essential qualities of a criminal proceeding. In permitting a person to engage in a Federally regulated business, the Government has, in effect, granted him a privilege. Suspension of the privilege for failure to comply with the statutory standard "is not primarily punishment for a past offense but is a necessary power granted to the Secretary of Agri-

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[58] The Department's severe sanction policy did not originate with *Saylor*, but, rather, was mentioned briefly in the first decision issued by the present Judicial Officer, *In re Henner*, 30 Agric. Dec. 1151, 1263-64 (1971), and was further developed in numerous other decisions before it was virtually finalized in *In re Miller*, 33 Agric. Dec. 53, 64-80 (1974), *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974). Slight revisions (mostly editorial) to the sanction policy were made in *Saylor*.

[59] Nietzsche, *Beyond Good and Evil* § 201, at 114 (1886; Kaufmann Trans., 1966).

culture to assure a proper adherence to the provisions of the Act." [60]

An administrative agency has the power to "impose a suspension as a 'sanction' against specific conduct or because of its 'deterrence' value -- either to the subject offender or to others similarly situated." [61] The function of an administrative sanction is "deterrence rather than retribution" (Schwenk, *The Administrative Crime, Its Creation and Punishment by Administrative Agencies*, 51 Mich. L. Rev. 51, 85 (1943)). Accordingly, since 1971 or 1972 the Department has followed the policy of imposing severe sanctions for repeated violations or violations that are regarded by the administrative officials and the Judicial Officer as serious, to serve as a deterrent not only to the respondent, but also to other potential violators.

Socrates recognized that "the proper office of punishment is twofold: he who is rightly punished ought either to become better and profit by it, or he ought to be made an example to his fellows, that they may see what he suffers, and fear and become better." [62]

Similarly, Plato said that no man is to be punished "because he did wrong, for that which is done can never be undone, but in order that, in the future times, he, and those who see him corrected, may utterly hate injustice, or at any rate abate much of their evil-doing." [63]

The deterrent effect of punishment of one violator on potential violators is recognized in Deuteronomy 13:10-11 (R.S.V.; see also, Deuteronomy 19:19-20), as follows:

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[60] *Nichols & Co.* v. *Secretary of Agriculture*, 131 F.2d 651, 659 (1st Cir. 1942). *Accord Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938); *Kent* v. *Hardin*, 425 F.2d 1346, 1349 (5th Cir. 1970); *Blaise D'Antoni & Associates, Inc.* v. *SEC*, 289 F.2d 276, 277 (5th Cir.), *cert. denied*, 368 U.S. 899 (1961); *Eastern Produce Co.* v. *Benson*, 278 F.2d 606, 610 (3d Cir. 1960); *Cella* v. *United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954); *Irving Weis & Co.* v. *Brannan*, 171 F.2d 232, 235 (2d Cir. 1948); *Nelson* v. *Secretary of Agriculture*, 133 F.2d 453, 456 (7th Cir. 1943); *Board of Trade of City of Chicago* v. *Wallace*, 67 F.2d 402, 407 (7th Cir.), *cert. denied*, 291 U.S. 680 (1933); *Farmers' Livestock Comm'n Co.* v. *United States*, 54 F.2d 375, 378 (E.D. Ill. 1931). See, also, *Steuart & Bros.* v. *Bowles*, 322 U.S. 398, 406-07 (1943); *Hawker* v. *New York*, 170 U.S. 189, 189-200 (1898); *Ex Parte Wall*, 107 U.S. 265, 287-90 (1882); *Brown* v. *Wilemon*, 139 F.2d 730, 731-32 (5th Cir. 1944); Chamberlain, Dowling, and Hays, *The Judicial Function in Federal Administrative Agencies* 93-95 (1942).

[61] *Pangburn* v. *CAB*, 311 F.2d 349, 354 (1st Cir. 1962). *Accord Hard* v. *CAB*, 248 F.2d 761, 763-65 (7th Cir. 1957), *cert. denied*, 355 U.S. 960 (1958); *Wilson* v. *CAB*, 244 F.2d 773, 773-74 (D.C. Cir.), *cert. denied*, 355 U.S. 870 (1957).

[62] 2 The Great Ideas: A Syntopicon of Great Books of the Western World *492-93 (1952) (Encyclopedia Britannica, Inc.)*.

[63] *Id.* at 492.

> You shall stone him to death with stones. . . . And all Israel shall hear, and fear, and never again do any such wickedness as this among you.

The purpose of sanctions imposed by the Department is, in this respect, the same as one of the purposes of criminal penalties. In the field of criminal law, one of the primary purposes of the penalty imposed on a particular violator is to deter other potential violators.

> [P]unishment, in this context [i.e., "general prevention"], is used not to prevent future violations on the part of the criminal, but in order to instill lawful behavior in others. [64]

> ["Deterrence"] is aimed at the protection of society. By making a certain action a punishable offense, we expect that people will refrain from committing the offense through fear of punishment. . . .

> The purpose of punishment as a deterrent . . . is also to demonstrate to the potential offender the consequences if he violates the law. [65]

> [T]he deterrent value of a correctional system is not restricted to those who come into direct contact with it but applies to the whole population. [66]

> [I]t is a primarily preventive consideration--having an eye to what is necessary to keep the people reasonably law-abiding--which today's legislators have in mind, too, when they define crimes and stipulate punishments. [67]

> *[P]olice regulations* which are such commonplaces in modern times: traffic ordinances, building codes, . . . regulations governing commerce, etc. Here there is no doubt that punishment for infraction has primarily a general-preventive function. Here nearly all of us are potential criminals. [68]

> The purpose of punishment, be it a criminal sentence, a civil penalty, or punitive damages, is not to inflict suffering or to impose a loss on the offender. Its object is to act as a deterrent: first to discourage the offender himself from repeating his transgression; and, second, to deter others from doing likewise.

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[64] Andenaes, *The General Preventive Effects of Punishment*, 114 U. of Pa. L. Rev. 949, 982 (1966).

[65] Gardiner, *The Purposes of Criminal Punishment*, 21 Mod. L. Rev. 117, 121 (1958).

[66] Gould and Namenwirth, *Contrary Objectives: Crime Control and the Rehabilitation of Criminals*, in Douglas, Crime and Justice in American Society 237, 246 (1971).

[67] Andenaes, *General Prevention - Illusion or Reality?*, 43 The J. of Crim. L., Criminology and Police Sci. 176, 177 (1952-53).

[68] *Id.* at 182.

> ["Sentencing is"] an exacting task in which the Court undertakes to . . . impose a sentence which will best protect society, deter others and punish . . . the offender. [70]

> More controversial but certainly no less important [than deterrence of the individual violator] is the need for *deterrence*, "general prevention," of potential criminals who may be dissuaded fiom crime by the threat and the administration of penalties. [71]

> Penalties are not provided as punishment for the individual who has gone wrong. Their imposition is alone justified for the effect the punishment may have upon the convict in preventing him from continuance in crime and in teaching him that "the way of the transgressor is hard." But the still greater effect to be attained is the deterrent effect the sentence may have upon those who may be inclined to follow the criminal course upon which the convict has embarked. [72]

> [D]eterrence looks primarily at the potential criminal outside the dock [of the courtroom]. . . . [73]

> Punishment can protect society by deterring potential offenders . . . . [74]

> [T]he greater the penalty, the "higher the costs associated with criminal activity," and the higher these costs, the fewer crimes committed. [75]

> One of these goals [of law] is deterrence by means of punishment. We punish in order to deter people from engaging in the undesirable conduct which we call a crime. . . . [D]eterrence, addresses itself, . . . both to the individual himself--we hope he will be deterred in the future--and to the entire community. [76]

Perhaps the most salient authority for the proposition that one of the primary ends of punishment is to serve as a deterrent to other potential

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[65] Gardiner, *The Purposes of Criminal Punishment*, 21 Mod. L. Rev. 117, 121 (1958).

[66] Gould and Namenwirth, *Contrary Objectives: Crime Control and the Rehabilitation of Criminals*, in Douglas, Crime and Justice in American Society 237, 246 (1971).

[67] Andenaes, *General Prevention - Illusion or Reality?*, 43 The J. of Crim. L., Criminology and Police Sci. 176, 177 (1952-53).

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Perhaps the most salient authority for the proposition that one of the primary ends of punishment is to serve as a deterrent to other potential

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[69] *Collins* v. *Brown*, 268 F. Supp. 198, 201 (D.D.C. 1967).

[70] *United States* v. *Mandracchia*, 247 F. Supp. 1, 4 (D.N.H. 1965).

[71] Tappan, *Crime, Justice and Correction* 243 (1960).

[72] *Id.* at 243 n.5, quoting from *People* v. *Gowasky*, 219 App. Div. 19, 24-25; 219 N.Y.S. 373, 380 (1926), *aff'd*, 244 N.Y. 451, 155 N.E. 737 (1927).

[73] Fitzgerald, *Salmond on Jurisprudence* § 15, at 94 (12th ed. 1966).

[74] Ibid.

[75] Berns, *Justified Anger: Just Retribution*, 3 Imprimis 3 (June 1974).

[76] Puttkammer, *Administration of Criminal Law* 8 (1953).

violators is Chief Justice William Howard Taft's statement written in 1928:

> [T]he chief purpose of the prosecution of crime is to punish the criminal and to deter others tempted to do the same thing from doing it because of the penal consequences. [77]

Johannes Andenaes, a leading authority from the University of Oslo, makes the same point, as follows: "From the point of view of sheer logic one must say that general prevention--*i.e.*, assurance that a minimum number of crimes will be committed--must have priority over special prevention-- *i.e.*, impeding a particular criminal from future offenses." [78]

In other words, it is more important to the general welfare of society to consider the effect that a sanction will have on other potential violators than to consider the sanction needed to prevent the particular individual from again violating the law. In fact, it is not uncommon to have certain types of offenses committed where "there will practically never be an individual preventive need for punishment" and yet punishment "is necessary for general prevention." [79]

Whether punishment achieves the objective of deterring others from violating the law is questioned by some authorities, [80] but affirmed by many others.

> As an argument for the abolition of the deterrent doctrine, it is often maintained that neither the threat nor application of penalties does prevent crime. This position reflects the simplistic notion, too commonly prevailing in matters of social action, that nothing has been achieved merely because not everything is accomplished that we should like. It is sometimes said that high crime rates prove that sanctions do not deter or that penalties actually invite the crimes of men who seek punishment to dissolve their feelings of guilt. With tiresome frequency the illustration is cited of the pickpockets who actively plied their trade in the shadow of the gallows from which their fellow knaves were strung. These assertions have a superficial relevance but they do not dispose of the issue by any means.
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> Persons with a will to believe in the efficacy of an exclusively individualistic and positivistic correctional system often quote the words of Warden Kirchwey. His patent oversimplifications of man's behavioral motivations should be noted, for this sort

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77 Menninger, *The Crime of Punishment* 194 (1968). The original statement of Chief Justice Taft's position appeared in his article, *Toward a Reform of the Criminal Law*, in The Drift of Civilization (1929).

78 Andenaes, *The General Preventive Effects of Punishment*, 114 U. of Pa. L. 952 (1966).

eneral Prevention - Illusion or Reality?, 43 The J. of Crim. L., Police Sci. 176, 196 (1952-53).

of loose thinking and naive criminological idealism pervert the ends of correction. (Footnote omitted).

. . . .

It is true, certainly, that the Classical doctrine of deterrence appears crudely oversimple in the light of modern conceptions of human behavior. In terms of reasonable goals for today it proposed to accomplish both too much and too little. This doctrine of deterrence was substantially more sound, however, than the position taken by those who deny any preventive effect to criminal sanctions. It is maintained here that the penal law and its application do in fact deter; indeed, with the declining efficacy of other forms of social control, it must be relied upon increasingly to maintain standards of behavior that are essential to the survival and security of the community. A complete failure of legal prevention cannot be inferred from the serious crimes committed by a small per cent of the population any more than can its success by the law obedience of the great preponderance of men. (Footnote omitted). The matter is not so simple. [81]

[As to studies] indicating that the death penalty is ineffective as a deterrent to murder, their very broad interpretation has rendered a disservice to the more general issue of punishment

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[80] See, *e.g.*, Menninger, *The Crime of Punishment* at viii, 9, 108, 113, 206-08 (1968). However, even though Menninger believes that our present system of punishing criminals is a "crime" (*id.* at 28, 86, 280), he favors "penalties" for violators. He states (*id.* at 202-03):

> Certainly the abolition of punishment does not mean the omission or curtailment of penalties; quite the contrary. Penalties should be greater and surer and quicker in coming. I favor stricter penalties for many offenses, and more swift and certain assessment of them.
>
> But these are not *punishments* in the sense of long-continued torture--pain inflicted over years for the sake of inflicting pain. If I drive through a red light, I will be and should be penalized.
>
> . . . .
>
> If we disregard traffic signals we are penalized, not punished. If our offense was a calculated "necessity" in an emergency, then the fine is the "price" of the exception.
>
> . . . .
>
> All legal sanctions involve penalties for infraction. But the punishment is an adventitious and indefensible *additional* corrupts the legal principle of *quid pro quo* with a "moral" Punishment is in part an attitude, a philosophy. It is the del fliction of pain in addition to or in lieu of penalty. It is the prol excessive infliction of penalty, or penalty out of all proportion fense.

[81] Tappan, *Crime, Justice and Correction* 245-46 (1960).

> as a deterrent to all kinds of criminal behavior. Such an expansive conclusion is obviously not justified since murder is, in many ways, a unique kind of offense often involving very strong emotions . [82]
>
> . . . .
>
> . . . It is naive to suppose that punishment exists in a vacuum and is unrelated to the specific kinds of acts and the meaning which the punishment has for the actor. [83]

That sanctions do, in fact, serve as a deterrent to "white-collar" violations is evidenced by a number of studies.

> As Sutherland's analysis of white-collar crime has shown, violators of the Sherman Antitrust law are relatively free from criminal prosecution, though the imposition of punishment would be *maximally effective* with this type of offense. [84]
>
> *An intensive study of parking violators indicates that . . . an increase in the severity and certainty of punishment does act as a deterrent to further violation. These findings suggest the necessity for a reappraisal of current thinking. Studies demonstrating the ineffectuality of punishment as a deterrent to certain types of offenses should not be interpreted to mean that punishment is ineffective in deterring all types of offenses.* [85]

Since one of the main purposes of a criminal law sentence is to deter other potential violators from committing similar violations, it follows, *a fortiori*, that one of the main purposes of an administrative law sanction is to deter other potential violators.

In criminal law, "[r]etribution or social retaliation, though persistently criticized by modern advocates of a progressive penology, continues to be a major ingredient of our penal law and of our correctional system." [86] "The principle of retribution was formulated in the *lex talionis*, the Mosaic doctrine expressed in *Deuteronomy*, 19:21: 'Thine eye shall not pity, but life shall go for life, eye for eye, tooth for

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[82] Chambliss, *The Deterrent Influence of Punishment*, 12 Crime & Delinq. 70, 71 (Jan. 1966).

[83] *Id.* at 75.

[84] *Chambliss*, Types of Deviance and the Effectiveness of Legal Sanctions, 1967 Wis. L. Rev. 703, 716 (emphasis supplied).

[85] Chambliss, *The Deterrent Influence of Punishment*, 12 Crime & Delinq. 70 (Jan. 1966).

[86] Tappan, *Crime, Justice and Correction* 241 (1960). See, also, Berns, *Justified Anger: Just Retribution*, 3 Imprimis (June 1974); 2 *The Great Ideas: A Syntopicon of Great Books of the Western World* 488-92 (1952) (Encyclopedia Britannica, Inc.).

tooth, hand for hand, foot for foot." [87]

But retribution or social retaliation is not one of the objectives of administrative sanctions--they are to "assure a proper adherence to the provisions of the Act" (*Nichols & Co.* v. *Secretary of Agriculture*, *supra* note 60). Deterrence--both as to the individual violator, and as to other potential violators--is the objective of an administrative sanction.

To serve as an effective deterrent to potential violators of a regulatory statute, administrative sanctions must be severe; sanctions which are too lenient, rather than being a deterrent, will serve as a catalyst for violations by others. Not all criminologists, sociologists, or jurists share this view; but many noted authorities do.

> Since the power of a legal threat to function as a simple deterrent comes from the unpleasantness of the consequences threatened, one natural strategy for increasing the deterrent efficacy of threats is to increase the severity of threatened consequences. The theory of increased penalties as a marginal deterrent is simple and straightforward: all other things being equal, an increase in the severity of consequences threatened should reduce the number of people willing to run the risk of committing a particular criminal act. . . . [88]
>
> . . . [W]hen penalties for criminal activity that many people find attractive are quite low, thereby making crime a reasonable alternative to legitimate means of obtaining gratification for many persons, even a high probability of apprehension may leave a high rate of the threatened behavior, and increases in the severity of threatened consequences can be expected to have a more substantial marginal deterrent effect than if the level of consequences threatened is already quite high in relation to the benefits obtainable through criminal means. . . . [89]
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> . . . .
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> . . . [I]f potential offenders believe that their chances of apprehension cannot be dismissed, the risk of a high penalty provides more incentive to avoid crime than the risk of a low penalty. . . . [90]
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> . . . .
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> . . . [I]t is likely that increases in the severity of threatened consequences are more or less significant, depending on the relationship between size of penalty increase and size of base

[87] Tappan, *Crime, Justice and Correction* 241 n.3 (1960).

[88] Zimring, *Perspectives on Deterrence*, Crime and Delinquency Issues, A Monograph Series, National Institute of Mental Health - Center for Studies of Crime and Delinquency 83-84 (DHEW Pub. No. (ADM) 74-10, 1971).

[89] *Id.* at 84.

[90] *Id.* at 85.

penalty. [91]

> If we are hopeful of the curative effects of a threat, we have to make the threat unpleasant, which is another way of saying that we have to be severe. [92]

Dr. Zimring, a noted authority, capsulizes this concept in answering the question, "how can the legal system make the best use of variations in severity [of sanctions] to achieve social defense?" by stating:

> One answer is that, since the goal of all legal threats is to keep the population law abiding, the potential effectiveness of variations in severity of threatening consequences should be used to create the widest possible distinction between criminal and noncriminal behavior by threatening all types of serious crime with penalties which are as severe as possible. The aim of this strategy is to create a walled fortress around criminal activity by using the full power of threatened consequences to keep potential criminals from becoming actual criminals.
>
> Another possible strategy would be to threaten all serious crimes with major penalties, but to save a considerable amount of variation in threatened penalties to underscore distinctions between *types of crime*, as well as between serious crime and law-abiding behavior. [93]

Johannes Andenaes, of the University of Olso, regarded by many as one of the most distinguished of the modern scholars writing about deterrence, states that "The simplest way to make people more law-abiding, therefore, is to increase the punishment." [94] Mr. Andenaes believes that "Feuerbach's formula of psychological coercion: the risk for the lawbreaker must be made so great, the punishment so severe, that he knows he has more to lose than he has to gain from his crime" has a "certain validity" as to violators of "economic regulations." [95] "*[E]conomic crimes*," to utilize his epithet, are clearly within the purview of the foregoing severity doctrine, such crimes being violations of "governmental regulation of the economy: price violations, rationing violations, unlawful foreign exchange transactions, offenses against

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[91] *Id.* at 89.

[92] Puttkammer, *Administration of Criminal Law* 16-17 (1953).

[93] Zimring, *Perspectives on Deterrence*, Crime and Delinquency Issues, A Monograph Series, National Institute of Mental Health - Center for Studies of Crime and Delinquency 90 (DHEW Pub. No. (ADM) 74-10, 1971).

[94] Andenaes, *General Prevention - Illusion or Reality?*, 43 The J. of Crim. L., Criminology and Police Sci. 176, 191 (1952-53).

[95] *Id.* at 178-79, 185.

workers protection, disregard of quality standards, and so on." [96]

The applicability of severe sanctions to deter violations of "regulations governing commerce" and other "economic" regulations is succinctly treated by Andenaes:

> I shall begin with a group of crimes which play a modest role in the literature but which have a good deal of practical importance and are good for illustration, all these *police regulations* which are such commonplaces in modern times: traffic ordinances, building codes, laws governing the sale of alcoholic beverages, regulations governing commerce, etc. Here there is no doubt that punishment for infraction has primarily a general-preventive function Here nearly all of us are potential criminals. A public-spirited citizen has, of course, certain inhibitions against breaking laws and regulations. But experience shows that moral and social inhibitions against breaking the law are not enough in themselves to insure obedience, where there is conflict with one's private interests. Thus the extent to which there can be effective enforcement by means of punishment determines to what extent the rules are actually going to be observed. . . . [97]
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> . . . .
>
> . . . A large number of the people who are affected by economic regulations . . . feel no strong moral inhibition against infraction. They often find excuses for their behavior in political theorizing: they oppose the current government's regulative policies. . . . Yet the matter of obedience or disobedience can often have important economic consequences. . . . In this area, at any rate, Feuerbach's law of general prevention has a certain validity: it is necessary that consideration as to the risk involved in breaking the law should outweigh consideration of the advantages to breaking the law.

Andenaes is careful to note that severity of punishment has a more salient effect on crimes, like economic violations, "committed after careful consideration . . . than for crimes which grow out of emotions or drives which overpower the individual (e.g. the so-called crimes of passion)." [99]

Isaac Ehrlich, in one of the most sophisticated analyses o
activity ever made, using a simultaneous equation
sion analysis involving fourteen variables, found th
cific crime categories, with virtually no exception
estimates of the probability of apprehension and
onment . . . and with the average length of tim

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[96] *Id.* at 184.

[97] *Id.* at 182.

[98] *Id.* at 185.

ons. . . ." [100]

Similarly, Professor Gordon Tullock states that "multiple regression studies show that increasing the frequency *or severity* of the punishment does reduce the likelihood that a given crime will be committed." [101] Professor Tullock concludes: "We have an unpleasant method--deterrence-- that works, and a pleasant method--rehabilitation--that (at least so far) never has worked." [102]

My views with respect to the necessity for severe sanctions for serious violations, in order to achieve the Congressional purpose of the Department's regulatory programs, were set forth in *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 843, 850-51 (1972) (ruling on reconsideration), as follows:

> Congress enacted the remedial regulatory programs administered by the Department because of a need for economic law and order in the marketplace. The administrative sanctions imposed against violators of such regulatory programs should tend to achieve that purpose.
>
> Persons who engage in a regulated business have been granted a privilege. Suspension or revocation of the privilege for failure to comply with the statutory standards is a necessary power granted to the Secretary to assure a proper adherence to the regulatory program (see the cases cited in the Decision and Order herein, p. 47). Just as a lawyer may lose his privilege to practice law if he embezzles a client's funds or engages in other serious violations, a futures commission merchant, broker, or trader who manipulates a futures market or engages in other serious violations may lose his privilege to engage in futures trading.

It is the general administrative practice under the Department's regulatory programs to institute formal actions only as to violations regarded as serious or repeated. Many minor violations are disposed of with a warning letter or an informal stipulation. Hence it is to be expected that the relatively few formal cases which are instituted will generally warrant relatively severe sanctions.

To summarize, a strong argument can be made in support of any philosophy of punishment or sanctions, ranging from extremely light to very severe. There are many excellent judges, criminologists, and sociologists at either end of the poles of this issue; many others take a position between the poles. For the reasons set forth above, where the

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99 *Id.* at 192.

100 *Ehrlich*, Participation in Illegitimate Activities: A Theoretical and *Empirical Investigation*, 81 J. of Pol. Econ. 545 (May-June 1973).

101 Tullock, *Does Punishment Deter Crime?*, 36 The Pub. Interest 103, 109 (1974) (emphasis supplied).

102 *Id.* at 110.

violation is either repeated or regarded by the administrative officials and the Judicial Officer as serious, this Department imposes severe sanctions to deter future violations by the respondent and others.

Another principle in determining the sanction to be imposed in a particular case is that, in general, there should be a reasonable relationship between the sanction and the unlawful practices found to exist. [103] In other words, the more serious the violation is regarded to be by the administrative officials and the Judicial Officer, the more severe should be the sanction. Even though punishment for the sake of punishment is not a relevant consideration in the field of administrative law, the principle of having a reasonable relationship between the violation and the sanction still has validity in a case of this nature. This is because in order to achieve the major Congressional purposes of the regulatory program, it is more important to deter violations the administrative officials and the Judicial Officer regard as serious, than it is to deter violations they regard as minor. Hence a severe sanction for a violation regarded by the administrative officials and the Judicial Officer as serious will have a greater deterrent effect than a milder sanction for a lesser violation, and thus will tend to effectuate the major objectives of the regulatory program.

In determining sanctions to be imposed by the Department, great weight is given to the recommendation of the officials charged with the responsibility for administering the regulatory program. See *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 843, 845-46 (1972) (ruling on reconsideration). Such administrative officials, during the day-to-day administration of a regulatory program, develop a "feel" for the severity of sanctions needed to serve as a deterrent to violations that cannot be developed by the Administrative Law Judges or the Judicial Officer, who come in contact with only a small part of the regulatory program.

The recommendation of the administrative officials as to the sanction is not, of course, controlling. For example, if some of the allegations are not proven or if there are mitigating circumstances not taken into consideration by the administrative officials, the sanction may be considerably less than that recommended by them. See, *e.g.*, *In re Ameri*

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[103] *Kent* v. *Hardin*, 425 F.2d 1346, 1349-50 (5th Cir. 1970)

Co. v. *United States*, 260 F.2d 286, 295-97 (7th Cir. 1958) (*en banc*), *cert. denied*, 359 U.S. 907 (1959); *Daniels* v. *United States*, 242 F.2d 39, 42 (7th Cir.), *cert. denied*, 354 U.S. 939 (1957); *Irving Weis & Co.* v. *Brannan*, 171 F.2d 232, 235 (2d Cir. 1948); *In re Romoff*, 31 Agric. Dec. 158, 177 (1972); *In re American Fruit Purveyors, Inc.*, 30 Agric. Dec. 1542, 1596 (1971). See, also, *American Power Co.* v. *SEC*, 329 U.S. 90, 112-18 (1946); *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 194 (1941); *Great Western Food Distrib., Inc.* v. *Brannan*, 201 F.2d 476, 484 (7th Cir.), *cert. denied*, 345 U.S. 997 (1953); *In re Electric Power & Light Corp.*, 176 F.2d 687, 692 (2d Cir. 1949); *Wright* v. *SEC*, 112 F.2d 89, 95 (2d Cir. 1940).

can Fruit Purveyors, Inc., 30 Agric. Dec. 1542 (1971). But if the alleged violations are proven, and it appears that the administrative officials have fully considered the respondent's contentions, the recommendation of the administrative officials as to the sanction needed to serve as an effective deterrent to the respondent and to other potential violators is given great weight.

Insofar as practicable, the sanctions imposed under a regulatory Act against comparable violators for comparable violations should be reasonably uniform. [104] From the beginning, the Judicial Officer has recognized that "[d]isciplinary action taken under [a regulatory] act should follow some general pattern, . . . so that one order will not be entirely out of line with another involving similar violations." [105] Accordingly, counsel should, in all cases, in their briefs and arguments, refer to *relevant* prior cases under the Act which should be considered in determining the appropriate sanction to be imposed in the particular case, in the event a violation is found to have occurred.

In determining whether one case is comparable to another, all of the relevant facts and circumstances must be considered, such as the nature of the violations, the nature of the respondents' businesses, the respondents' prior record as to violations, and prior warnings given to the respondents.

Also, the goal of uniform sanctions for comparable violations necessarily applies only to contested cases. Consent orders issued without a hearing are given no weight in determining the sanction to be imposed in a litigated case. In a case where a consent order is agreed to by the

[104] Inequality in judicial sentencing occurs "every day, often in different courtrooms in the same courthouse. Two boys fail to report for military induction—one is sentenced to five years in prison, the other gets probation and never enters a prison. One judge sentences a robber convicted for the third time to one year in prison, while another judge on the same bench gives a first offender ten years. One man far more capable of serious crime than another and convicted of the same offense may get a fine, while the less fortunate and less dangerous person is sentenced to five years in the state penitentiary." Clark, *Crime in America* 224 (1970). There is no excuse for such erratic sanctions in administrative disciplinary proceedings before a single agency. (The desired uniformity will not be achieved, however, if reviewing courts, with their divergent viewpoints as to "punishment" and the proper balance between the public interest and parochial interests, substitute their judgment for that of the agency as to the sanction policy needed to effectuate the congressional purpose.)

[105] *In re Watkins Comm'n Co.*, 4 Agric. Dec. 395, 400 (1945). See, also, *In re Romoff*, 31 Agric. Dec. 158, 177 (1972); *In re American Fruit Purveyors, Inc.*, 30 Agric. Dec. 1542, 1595-96 (1971); *In re Poovey*, 27 Agric. Dec. 1512, 1520-22 (1968); *In re Fairbank*, 27 Agric. Dec. 1371, 1384 (1968), *aff'd*, 429 F.2d 264 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970); *In re Boone Livestock Co.*, 27 Agric. Dec. 475, 503 (1968); *In re Silver, d/b/a Chambersburg Livestock Sales*, 21 Agric. Dec. 1438, 1452 (1962).

parties, there is no record or argument to establish the basis for the sanction. It may seem less than appears warranted because of problems of proving the allegations of the complaint or because of mitigating circumstances not revealed to the Administrative Law Judge or the Judicial Officer. Other circumstances, such as personnel and budget considerations and the delay inherent in litigation, may also cause a consent order to seem less severe than appropriate. Conversely, a consent order may seem more severe than appears warranted because of aggravated circumstances not revealed by the complaint.

In some cases, following the "deterrent policy" set forth above may lead to the imposition of a sanction more severe than the sanctions previously imposed under the Act for similar violations. If so, uniformity must yield to effectiveness. An effective sanction will be issued in such cases even if it is more severe than sanctions previously imposed for similar violations. In such circumstances, uniformity will be achieved only as to cases subsequent thereto.

In other words, uniformity is a desirable goal; but it is not an absolute requirement. A respondent has no inherent right to a sanction no more severe than that applied to others. See *Hiller* v. *SEC*, 429 F.2d 856, 858-59 (2d Cir. 1970); *G.H. Miller & Co.* v. *United States*, 260 F.2d 286, 296 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959). As the Court held in *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 186-87 (1973):

> We read the Court of Appeals' opinion to suggest that the sanction was "unwarranted in law" because "uniformity of sanctions for similar violations" is somehow mandated by the Act. We search in vain for that requirement in the statute. . . . The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases.

An agency is free to reconsider sanctions previously imposed without prior notice. *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 228 (1946); *Continental Broadcasting, Inc.* v. *FCC*, 439 F.2d 580, 582-84 (D.C. Cir. 1971); *NLRB* v. *Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (quoted with approval in Davis, *Administrative Law Treatise* § 17.08, at 604 (1970 Supp.)). In *FCC* v. *WOKO, Inc.*, 329 U.S 228 (1946), the Court held:

> Much is made in argument of the fact that deceptions character have not been uncommon and it is claimed th have not been dealt with so severely as in this case. . . mild measures to others and the apparently unann change of policy are considerations appropriate for the mission in determining whether its action in this case drastic, but we cannot say that the Commission is bo anything that appears before us to deal with all cases times as it has dealt with some that seem comparable.

As I stated in *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 843, 850 (1972) (ruling on reconsideration):

> In any case in which the Judicial Officer determines that the sanctions previously imposed for similar violations are not adequate under present circumstances to effectuate the purposes of the regulatory program, a more severe sanction will be imposed in that case, rather than merely announcing that in future cases the sanction will be increased. An administrative agency is free to reconsider sanctions previously imposed without prior notice (see *In re Louis Romoff*, 31 Agriculture Decisions 158, 186, and cases cited therein), and such practice will be routinely followed. Persons who intentionally violate a regulatory program are not playing a game under which they are entitled to consider the sanctions previously imposed for similar violations and determine whether they want to run the risk of detection and the imposition of such a sanction. They run the distinct risk that a more severe sanction will be imposed against them.

To conclude this portion of the extended discussion as to the Department's sanction policy, Congress has determined that there is a need for Federal regulation of the agricultural marketing system. To achieve the Congressional purposes with respect to the various remedial statutes administered by the Department, severe sanctions must be imposed for violations regarded by the administrative officials and the Judicial Officer as serious. We have no reasonable alternative. "For whatever our opinion may be on the question of free versus controlled economy, there is no denying that ineffective regulation is the worst arrangement of them all."[106]

Turning now to other aspects of the Department's sanction policy that have previously been separately stated, case-by-case, rather than included as part of the overall sanction policy, evidence of current compliance with the Department's regulatory programs is totally irrele-

[106] Andenaes, *General Prevention - Illusion or Reality?*, 43 The J. of Crim. L., Criminology and Police Sci. 176, 184 (1952-53).

vant in determining the sanction for past violations. [107] And an administrative sanction is imposed where a violation has been proven regardless of the respondent's contention that others have similarly violated the Act and have not been proceeded against. [108]

A sanction is not reduced merely because the violator did not know the procedure required by the Act and regulations. [109] Similarly, where the Act makes principals liable for the acts of their agents, a sanction is not reduced merely because a principal had no knowledge of the violation. [110] In addition, the fact that the corporate officer primarily responsible for the corporation's violations is deceased when the order is issued is not a mitigating circumstance as to the corporation. [111] Furthermore, if the Judicial Officer determines that a violation occurred, the sanction is not reduced merely because the Administrative Law Judge held that no violation occurred. [112]

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[107] *In re Mountainside Butter & Egg Co.*, 38 Agric. Dec. 789, 800 (1978) (remand order), *final decision*, 39 Agric. Dec. 862, 863-64 (1980), *aff'd*, No. 80-3898 (D N.J. June 23, 1982), *aff'd mem.*, 722 F 2d 733 (3d Cir. 1983), *cert. denied*, 104 S. Ct 1417 (1984); *In re American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1372, 1387-88 (1979), *aff'd per curiam*, 630 F.2d 370 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981); *In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120 (1978); *In re Breckenridge Auction & Sales Co.*, 36 Agric. Dec. 1522, 1530 (1977); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 135, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Miller*, 33 Agric. Dec. 53, 62, 81, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974); and *see In re Catanzaro*, 35 Agric. Dec 26, 35 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467.

[108] *In re American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1372, 1385 (1979), *aff'd per curiam*, 630 F.2d 370, 374 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981); *In re King Meat Co.*, 42 Agric. Dec. 726, 733-35 (1983) (order on remand), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (reinstating *nunc pro tunc* original order of Oct. 20, 1982, *aff'g* 40 Agric. Dec. 1468), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished); and *see Midwest Farmers, Inc.* v. *United States*, 64 F. Supp. 91, 96-97 (D. Minn. 1945) (3-judge ct.) (evidence that others violated Act properly rejected).

[109] *In re Carter*, 46 Agric. Dec. ____, slip op. at 14 (Mar. 3, 1987); *In re Steinberg Bros. Co.*, 43 Agric. Dec. ____, slip op. at 21 (Dec. 26, 1984).

[110] *In re Esposito*, 38 Agric. Dec. 613, 621-22 (1979).

[111] *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. ____ (Mar. *aff'd*, 810 F.2d 916 (9th Cir. 1987).

[112] *In re Corona Livestock Auction, Inc.*, 36 Agric. Dec. 1285, 13 *rev'd on other grounds*, 607 F.2d 811 (9th Cir. 1979); *In re M. & I Co.*, 34 Agric. Dec. 700, 703-05, 748-52 (1975), *aff'd mem.*, 549 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977); *In re American Comm kers, Inc.*, 32 Agric. Dec. 1765, 1767, 1796-1800 (1973); *In re I* Agric. Dec. 1151, 1153-55, 1263-64 (1971).

The fact that a violator's customers are satisfied with the transactions is irrelevant in determining the sanction. [113]

The length of a suspension order for a large operator may be somewhat shorter than in the case of a comparable violation by a smaller registrant because the suspension of an unusually large registrant has a much greater monetary effect than the similar suspension of a smaller registrant. [114] However, no effort is made to make the monetary costs of suspension orders uniform for similar violations. [115]

The fact that a suspension order affects a portion of the respondent's business that was not involved in the violations is considered in determining the length of the suspension period. [116]

If a criminal penalty has been imposed on the respondent before an administrative sanction is imposed for the same violation, the combined effect of the two sanctions is taken into consideration. [117]

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[113] *In re Saylor*, 44 Agric. Dec. ____, slip op. at 186, 496 (Sept. 20, 1985) (final decision on remand); *In re Steinberg Bros. Co.*, 43 Agric. Dec. ____, slip op. at 24-25 (Dec. 26, 1984); *In re Peterman*, 42 Agric. Dec. ____, slip op. at 34 (Dec. 12, 1983), *aff'd*, 770 F.2d 888 (10th Cir. 1985).

[114] *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. ____ (Jan. 30, 1985); *In re Farrow*, 42 Agric. Dec. 1397, 1434 (1983), *aff'd in part & rev'd in part*, 760 F.2d 211 (8th Cir. 1985) (merits affirmed; suspension order reversed); *In re Esposito*, 38 Agric. Dec. 613, 631-32 (1979); *In re Townsend*, 35 Agric. Dec. 1604, 1607 (1976); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1845-51 (1975); *In re Worsley*, 33 Agric. Dec. 1547, 1579-82 (1974); and *see In re Magic Valley Potato Shippers, Inc.*, 40 Agric. Dec. 1557, 1571 (1981), *aff'd per curiam*, 702 F.2d 840 (9th Cir. 1983).

[115] *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1846 (1975).

[116] *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. ____ (Jan. 30, 1985); *In re Farrow*, 42 Agric. Dec. 1397, 1434 (1983), *aff'd in part & rev'd in part*, 760 F.2d 211 (8th Cir. 1985) (merits affirmed; suspension order reversed); *In re Rubel*, 42 Agric. Dec. 800, 803-05 (1983); *In re Esposito*, 38 Agric. Dec. 613, 633 (1979); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1563-64 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Speight*, 33 Agric. Dec. 280, 317-18 (1974).

[117] *In re Peterman*, 42 Agric. Dec. ____ (Dec. 12, 1983) ($20,000 civil penalty not too severe for bait-and-switch advertising violations, notwithstanding a criminal sanction of 2 years' imprisonment, 3 years' probation, and a $2,700 fine), *aff'd*, 770 F.2d 888 (10th Cir. 1985); *In re Magic Valley Potato Shippers, Inc.*, 40 Agric. Dec. 1557, 1565-68 (1981), *aff'd per curiam*, 702 F.2d 840 (9th Cir. 1983); *In re Nat'l Meat Packers, Inc.*, 38 Agric. Dec. 169, 178-79 (1978); *In re Indiana Slaughtering Co.*, 35 Agric. Dec. 1822, 1831 n.8 (1976), *aff'd sub nom. Indiana Slaughtering Co. v. Bergland*, No. 76-3949 (E.D. Pa. Aug. 1, 1977).

Arguments by respondents for reduced sanctions because of damaging publicity resulting from agency press releases when a complaint is issued or the case is decided are rejected. [118] The fact that the complainant offered respondent a consent order prior to hearing which was less than the suspension order recommended at the hearing is, of course, irrelevant. [119] If a regulatory requirement is susceptible of more than one reasonable construction, and the Department's construction is not published or brought to the respondent's attention, that is a weighty circumstance in determining the sanction. [120]

No consideration is given to some circumstances that are given weight in criminal proceedings. Personal circumstances, e.g., the violator's health, need to work, or prior tragic experiences, are ignored because consideration of such circumstances "would not be conducive to achieving the purposes of the remedial legislation and, therefore, would not be in the public interest." [121] Also ignored are whether the violator assisted the government in proceedings against other violators, [122] and whether the sanction is appropriate to rehabilitate the violator. [123]

In determining criminal punishments, consideration as to whether lenient punishment should be imposed in order to rehabilitate the violator so that he/she can function normally in society must be weighed against the desirability of imposing punishments that will serve as an effective deterrent to the violators and other potential violators. But there is no public need to have violators of the Department's regulatory

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[118] *In re Holiday Food Servs., Inc.*, 45 Agric. Dec. ____ (May 8, 1986); *In re Speight*, 33 Agric Dec. 280, 304-05 (1974); *In re Miller*, 33 Agric. Dec. 53, 81-82, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974). In *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 188 (1973), the Court upheld a suspension order under the Act notwithstanding the "damaging publicity" issued by the agency. *Accord Miller* v. *Butz*, 498 F.2d 1088, 1089 (5th Cir. 1974) (per curiam); *Bowman* v. *USDA*, 363 F.2d 81, 86 (5th Cir. 1966).

[119] *In re Bosma*, 41 Agric. Dec. 1742, 1755-56 (1982), *aff'd in part & rev'd in part*, 754 F.2d 804 (9th Cir. 1984); *In re Nat'l Meat Packers, Inc.*, 38 Agric. Dec. 169, 179-80 (1978); *In re Miller*, 33 Agric. Dec. 53, 82-83, *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974).

[120] *In re King Meat Co.*, 40 Agric. Dec. 1468, 1493 n.21 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (reinstating *nunc pro tunc* original order of Oct. 20, 1982, *aff'g* 40 Agric. Dec. 1468), *aff'd*, 742 F.2d 1462 (9[illegible] (unpublished).

[121] *In re Indiana Slaughtering Co.*, 35 Agric. Dec. 1822, 1831 *nom. Indiana Slaughtering Co.* v. *Bergland*, No. 76-3949 (I 1977).

[122] *In re Nat'l Meat Packers, Inc.*, 38 Agric. Dec. 169, 178 (

[123] *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec.

statutes remain in the regulated industries. Congress has found that those industries are so important to the welfare of the nation that special regulation is necessary to insure fair and competitive conditions in the industries. Accordingly, administrative sanctions are imposed to serve as an effective deterrent to future violations so as to achieve the legislative purpose irrespective of the consequences to particular violators.

Requests by creditors of a respondent for a lenient sanction so that the violator will be able to make additional payments to the creditors are routinely rejected since the Secretary must consider the broader public interest, involving thousands of other persons affected by the administration of the regulatory program. [124]

Similarly, any hardship to the respondent's community, customers or employees which might result from a disciplinary order is given no weight in determining the sanction, in order to protect the broader public interest, which is best served by imposing severe sanctions for serious or repeated violations, to serve as an effective deterrent to future violations. [125]

Where a suspension order has been issued, the Judicial Officer will not delay the effective date of the suspension order in order to permit

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[124] *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. ____, slip op. at 32 (Jan. 27, 1984); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151, 1170-72 (1983); *In re Bananas, Inc.*, 42 Agric. Dec. 426, 426-27 (order denying intervention), *final decision*, 42 Agric. Dec. 588, 606 (1983); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2441-42 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re VPC, Inc.*, 41 Agric. Dec. 734, 746 n.6 (1982); *In re Catanzaro*, 35 Agric. Dec. 26, 34-35 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977).

[125] *In re Harry Klein Produce Corp.*, 46 Agric. Dec. ____, slip op. at 14-15 (Feb. 6, 1987); *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. ____ (Mar. 7, 1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Powell*, 41 Agric. Dec. 1354, 1365 (1982); *In re Hatcher*, 41 Agric. Dec. 662, 670-71 (1982); *In re Gus Z. Lancaster Stock Yards, Inc.*, 38 Agric. Dec. 824, 825 (1979); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1737-38 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 302, 311, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1128-29, 1136 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Red River Livestock Auction, Inc.*, 36 Agric. Dec. 980, 989-90 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1562 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1851-52 (1975); and *see In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120-21 (1978); *In re Armour & Co.*, 37 Agric. Dec. 109, 112 (1978).

the respondent to sell the business property. [126] Also, the Judicial Officer will not suspend a revocation order under the Perishable Agricultural Commodities Act to permit the proposed sale of respondent's business, or withdraw the revocation order if the proposed sale is consummated. [127] Similarly, the Judicial Officer will not delay the effective date of the suspension order so that the suspension period will occur when volume is light, e.g., during the Christmas holiday season. [128] On the other hand, the effective date of the suspension order may be intentionally set to begin during the respondent's "heavy" season. [129]

In conclusion, the Department's sanction policy takes a hard-nosed, but even-handed, approach to violations of the regulatory statutes administered by this Department. In every respect, the Department's sanction policy treats the national interest in achieving the congressional purpose of each regulatory statute as paramount over the parochial interests of the violator and the violator's creditors, customers, employees and community.

D. Change in USDA Sanction Policy Following Eighth Circuit's Decision in Farrow v. USDA.

The Department's sanction policy has been rewritten in this case so that the holding in *Farrow* v. *USDA*, 760 F.2d 211, 212-16 (8th Cir. 1985), cannot be applicable to this case or any future case. [130] In *Farrow*, the Judicial Officer issued a 45-day suspension order and a cease and desist order because respondents Farrow and Knoke entered into an agreement under which they did not bid against each other for the purchase of "pound" cows at the Algona Livestock Auction and Exchange, Algona, Iowa. *In re Farrow*, 42 Agric. Dec. 1397, 1434 (1983), *aff'd in part and rev'd in part*, 760 F.2d 211 (8th Cir. 1985).

Although the court in *Farrow* agreed with the Judicial Officer that the agreement not to compete created a likelihood that the prices at

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[126] *In re Overland Stockyards, Inc.*, 35 Agric. Dec. 12, 12 (1976) (order denying reconsideration).

[127] *In re Old Virginia, Inc.*, 42 Agric. Dec. 270, 272 (1983).

[128] *In re Mattes Livestock Auction, Mkt., Inc.*, 42 Agric. Dec. ___ (Dec. 5, 1983) (removal of stay order) (following Court of Appeals affirma would have resulted in the suspension occurring during the light-volum holiday season, lifting of stay order was delayed to prevent suspensio becoming effective at that time).

[129] *In re Magic Valley Potato Shippers, Inc.*, 40 Agric. D *aff'd per curiam*, 702 F.2d 840 (9th Cir. 1983).

[130] Previously, I announced that *Farrow* will not be followed by this Department even in the Eighth Circuit. *In re Upton*, 44 Agric. Dec. ____, slip op. at 32 n.14 (Oct. 2, 1985); *In re Upton*, 44 Agric. Dec. ____, slip op. at 3-7 (Dec. 4, 1985) (ruling on reconsideration).

which the "pound" cows were purchased would be reduced, the court set aside the suspension order, leaving in effect only a cease and desist order, on the grounds that under Department policy, a severe order is imposed only in the case of flagrant and serious violations, and the court did not believe that the agreement not to compete was intentional, flagrant, or serious. The court held (760 F.2d at 213, 214, 216) (emphasis supplied):

> The JO found that Knoke and Farrow had been the principal buyers of pound cows at Algona, but had "entered into an agreement that (i) . . . Farrow would buy the pound cows at Algona when he was present, (ii) . . . Knoke would refrain from buying pound cows at Algona when . . . Farrow was present, and (iii) [Knoke and Farrow] would share the profits on the pound cows." . . .
>
> . . . .
>
> We have little difficulty concluding that there was sufficient evidence to support the JO's finding that Knoke and Farrow made an agreement with the terms he described. We agree that an effect of such an agreement was that Knoke and Farrow would not bid competitively in purchasing pound cows at Algona, although they had previously done so. . . .
>
> . . . .
>
> . . . Although there were three other dealers who bought, there is evidence to support the JO's finding that Knoke and Farrow were the principal buyeis of pound cows at Algona. *We can agree with the JO that elimination of one of the principal buyers as an active bidder* tended to reduce competition at the Algona sales and, as a result, *created a likelihood that the prices at which the cows were purchased would be reduced.*
>
> . . . .
>
> We agree with the JO that a practice which is likely to reduce competition and prices paid to farmers for cattle can be found an unfair practice under the Act, and be a predicate for a cease and desist order. . . .
>
> . . . .
>
> *We sustain the JO's cease and desist order on the basis that petitioners' agreement and practice posed a danger of reduction of prices to farmers, resulting from a diminution of competition.* We do not sustain any findings that petitioners intended to cause a price reduction by this practice or that prices were reduced.
>
> Petitioners contend that suspension of their entire operations for forty-five days would be fatal to their businesses. The JO acknowledged that his order is a "severe" sanction. He considered it justified under Department policy because the viola-

tions were "intentional, flagrant, and serious" and because petitioners must have known that their agreement was unlawful.

The record contains no support for deeming the violations intentional, flagrant, or serious, or that petitioners were aware of unlawfulness.

We are mindful that nothing in 7 U.S.C. § 204, authorizing suspensions, "confines its application to cases of 'intentional and flagrant conduct' or denies its application in cases of negligent or careless violations." *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187, 93 S.Ct. 1455, 1458, 36 L.Ed.2d 142 (1973). *Butz* was a case where the suspension order was based on violations committed in disregard of previous warnings, not present here. The Supreme Court also expressed doubt as to this court's premise that the Secretary's practice was to impose suspensions only in cases of intentional and flagrant conduct.

Here, however, the JO's decision indicates that under Department policy the admittedly severe order is predicated on the violation being flagrant and serious.

. . . .

We cannot sustain the JO's view that petitioners must have known their agreement was unlawful.

Accordingly, we affirm the part of the order which commands petitioners to cease and desist from conduct, but set aside that part which suspends them as registrants.

I believe the Eighth Circuit not only misconstrued my decision in *Farrow*, but, also, violated *Butz* v. *Glover* in setting aside the 45-day suspension order. The Judicial Officer's basis for the 45-day suspension order was stated in *Farrow* as follows (slip op. at 54-57):

IV. The Sanction to be Imposed.

Respondents' violations were intentional, flagrant and serious. Prior to their agreement at issue here, respondents were the principal buyers of pound cows at the Algona stockyard. After their agreement, they no longer competed against each other for pound cows at Algona.

In the words of respondent Farrow, "[w]e used to fight for them [*i.e.*, the pound cows] but we get togethe now" (CX 6, at 2). In the words of respondent L and principal owner of Knoke Livestock Buyer have a partnership on the cows going to Norther 220).

Respondents would have to be incredibly that their agreement violated the compreh Stockyards Act regulatory program. I do n are incredibly naive. [21] But in any event, so that a suspension order can be issued (5 if a person (i) intentionally does an act w irrespective of evil motive, or reliance on er

(ii) acts with careless disregard of statutory requirements. *In re Shatkin*, 34 Agric. Dec. 296, 298–314 (1975), and cases cited therein. And *see Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 185–87 (1973).

[21] Respondent Lenz does approximately *$1 million* worth of livestock business *a week* (Tr. 219), and respondent Farrow is also a substantial livestock dealer, buying livestock five days a week (CX 6). Respondent Lenz had been in the livestock business about 22 years (Tr. 198) and respondent Farrow about 33 years (Tr. 226).

The Court stated in *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 186–87 (1973):

> The Secretary may suspend "for a reasonable specified period" any registrant who has violated any provision of the Act. 7 U.S.C. § 204. Nothing whatever in that provision confines its application to cases of "intentional and flagrant conduct" or denies its application in cases of negligent or careless violations. Rather, the breadth of the grant of authority to impose the sanction strongly implies a congressional purpose to permit the Secretary to impose it to deter repeated violations of the Act, whether intentional or negligent.

Respondents' conduct strikes at the core of fair competition, and is a flagrant and serious violation of the Act. The Act was passed to assure that anti-competitive practices would not occur in the livestock and meat packing industries. Thus, the sanction imposed must reflect the seriousness of the violations and be sufficient to insure future compliance by respondents and other potential violators.

It is the policy of this Department to impose severe sanctions for serious violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents but also to other potential violators. . . .

. . . .

Considering the serious and flagrant nature of respondents' violations, the 45-day suspension order recommended by complainant [illegible] opriate in this case. The suspension period [illegible] longer except for the fact that respon- [illegible][23] and the pound cow market is only [illegible] usiness.[24]

[illegible] ircuit's error in setting aside the *Far-* [illegible] ailed discussion of my views as [illegible] Dec. ____, slip op. at 3–7 [illegible]). In any event, I am more

clearly stating those portions of the Department's sanction policy which led the court in *Farrow* to hold that it could overturn the suspension order notwithstanding *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 183, 185–89 (1973), which held (in overruling a prior Eighth Circuit order setting aside the Judicial Officer's 20-day suspension order imposed in a false weighing case under the Packers and Stockyards Act):

> We conclude that the setting aside of the suspension was an impermissible judicial intrusion into the administrative domain under the circumstances of this case, and reverse.
>
> . . . .
>
> The applicable standard of judicial review in such cases required review of the Secretary's order according to the "fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" *American Power Co.* v. *SEC*, 329 U.S. 90, 112 (1946). Thus, the Secretary's choice of sanction was not to be overturned unless the Court of Appeals might find it "unwarranted in law or . . . without justification in fact. . . ." *Id.*, at 112–113; *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941); *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413–414 (1958); *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244, 250 (1967); 4 K. Davis, Administrative Law § 30.10, pp. 250–251 (1958). . . .
>
> . . . The Secretary may suspend "for a reasonable specified period" any registrant who has violated any provision of the Act. 7 U.S.C. § 204. Nothing whatever in that provision confines its application to cases of "intentional and flagrant conduct" or denies its application in cases of negligent or careless violations. Rather, the breadth of the grant of authority to impose the sanction strongly implies a congressional purpose to permit the Secretary to impose it to deter repeated violations of the Act, whether intentional or negligent. . . .
>
> Moreover, the Court of Appeals may have been in error in acting on the premise that the Secretary's practice was to impose suspensions only in cases of "intentional and flagran[illegible] duct." [Footnote omitted referring to numerous [illegible] pensions issued without a finding of intentional [illegible] duct.] The Secretary's practice, rather, appare[illegible] ploy that sanction as in his judgment best serves to deter violations and achieve the objectives of that statute. [Amen!] Congress plainly intended in its broad grant to give the Secretary that breadth of discretion. Therefore, mere unevenness in the application of the sanction does not render its application in a particular case "unwarranted in law."
>
> Nor can we perceive any basis on this record for a conclusion that the suspension of respondent was so "without justification in fact" "as to constitute an abuse of [the Secretary's]

> [brackets in original] discretion." *American Power Co.* v. *SEC*, 329 U.S., at 115; *Moog Industries, Inc.* v. *FTC*, 355 U.S., at 414; *Barsky* v. *Board of Regents*, 347 U.S. 442, 455 (1954). The Judicial Officer rested the suspension on his view of its necessity in light of respondent's disregard of previous warnings. The facts found concerning the previous warnings and respondent's disregard of these warnings were sustained by the Court of Appeals as based on ample evidence. In that circumstance, the overturning of the suspension authorized by the statute was an impermissible intrusion into the administrative domain.
>
> Similarly, insofar as the Court of Appeals rested its action on its view that, in light of damaging publicity about the charges, the cease-and-desist order sufficiently redressed respondent's violations, the court clearly exceeded its function of judicial review. The fashioning of an appropriate and reasonable remedy is for the Secretary, not the court. The court may decide only whether, under the pertinent statute and relevant facts, the Secretary made "an allowable judgment in [his] choice of the remedy." *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 612 (1946).

Following *Butz* v. *Glover*, *supra*, the *Farrow* decision is the only decision where a reviewing court has upheld the Department's factual determinations, but set aside the Department's administrative sanction. The court in *Farrow* stated that it had authority to overturn the suspension order notwithstanding *Butz* v. *Glover* because the Judicial Officer had voluntarily adopted the policy of imposing severe sanctions only in the case of violations which were in fact (i.e., regarded by the reviewing court as) flagrant, serious and intentional. Although I never intended my prior decisions to be so interpreted, I will clearly state here that it is the policy of this Department to impose severe sanctions in the case of violations that are neither repeated, flagrant, serious, nor intentional (in the view of a reviewing court), provided that, in the view of the administrative officials (who administer the regulatory program on a [illegible] day basis) and the Judicial Officer, the violations are regarded [illegible] rant or repeated.

[illegible] the Department's sanction policy, which was [illegible] sing "severe sanctions for serious violations [illegible] programs administered by the Department" [illegible] gric. Dec. ____, slip op. at 498 (Sept. 20, [illegible] on remand), it never occurred to me that a reviewing court, which reviews, at most, only a few Packers and Stockyards Act cases in a lifetime, would substitute its judgment for that of the Administrator of the Packers and Stockyards Administration, who has about

40 years' experience in the livestock marketing field, [131] and the Judicial Officer, who has 33 years' experience under the Packers and Stockyards Act (see note 45, *supra*), as to what constitutes a serious violation under the Act.

Specifically, it never occurred to me that any judge would substitute his judgment for that of the Administrator and the Judicial Officer that it is a serious violation when the two principal buyers of a particular type of animal at a stockyard agree not to compete against each other when, as the court concedes, the agreement "created a likelihood that the prices at which the cows were purchased would be reduced" (760 F.2d at 214).

If reviewing courts have the power to substitute their judgment as to what violations are "serious" for that of the agency charged with administering the Packers and Stockyards Act because I have voluntarily limited this Department to imposing severe sanctions only in those cases that are in fact (i.e., regarded by the reviewing court as) serious, flagrant, and intentional, it would be irresponsible for me not to change that policy!

In addition, if a reviewing court is going to review an administrative determination as to whether a "severe" sanction is warranted because the violation is, in fact, "serious," the court should recognize that the words "serious" and "severe" cover a broad range. For example, although the violations in *Farrow* were regarded by the Judicial Officer as "serious," and the 45-day suspension order as "severe," the violations were obviously regarded by the Judicial Officer as only 25% as "serious" as the check-kiting violations in *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. ____ (Mar. 7, 1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987), in which a 6-month suspension order was issued (45 -.. 182 = .247). Similarly, the violations in *Farrow* were obviously regarded by the Judicial Officer as only 6% as serious as the failure-to-pay violations in *In re Garver*, 45 Agric. Dec. ____ (June 19, 1986), *appeal docketed*, No. 86-4081 (6th Cir. Nov. 28, 1986), in which a 2-year suspension order was issued (45 -.. (365 x 2) = .062) [illegible]
the violations in *Farrow* were obviously regarded by the Ju[illegible]
as only 2% as serious as the check-kiting and failure t[illegible]
in *In re Farmers & Ranchers Livestock Auction, Inc.*,

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[131] Mr. B. H. (Bill) Jones, Administrator of the P[illegible]
stration since October 1981, has been involved in [illegible]
life, except for a few years in college and the milit[illegible]
livestock ranch. For about the last 40 years, h[illegible]
dealing with the livestock industry, including bein[illegible]
operation, an official of the Chicago stockyards, an official [illegible]
stock organizations, and Assistant Director of the Nebraska Department of Agriculture. When I was Administrator of the Packers and Stockyards Administration, he was one of the industry leaders I conferred with concerning agency policy.

____ (Feb. 27, 1986), in which a 5-year suspension order was issued (45 -.. (365 x 5) = .025). Hence the words "serious" and "severe" are such chameleonic terms as to be totally useless to a reviewing court seeking to determine whether a 45-day suspension order is "reasonable."

In conclusion, it is the policy of the Department in this case, and hereafter, to impose "severe" sanctions in the case of violations that are, in fact (i.e., according to the reviewing court), neither "serious," flagrant, repeated, nor intentional, so long as the administrative officials and the Judicial Officer (erroneously, according to the reviewing court) determine that the violations are either serious, or flagrant, or repeated.

With respect to "intentional" conduct and knowledge of unlawfulness, it has never been the policy of this Department to limit severe sanctions to the case of intentional violations, or to violations done with knowledge of their unlawfulness. *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974). I do not recall any contested case where a respondent has admitted that he knew that he was violating the law. Frequently, I infer that certain conduct was intentional and done with knowledge of unlawfulness (for the benefit of reviewing judges who may dislike my hard-nosed sanction policy), as I did in *Farrow*, but the sanction would be the same irrespective of those circumstances. *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974). In *In re Steinberg Bros. Co.*, 43 Agric. Dec. ____, slip op. at 21 (Dec. 26, 1984), it is explained that "ignorance of the law is never an excuse or even a mitigating circumstance in a disciplinary proceeding under the Act" because:

> If ignorance of the law were a mitigating circumstance, it would be a disincentive to licensees becoming familiar with the regulatory requirements under the Act, which would tend to thwart the purpose of this remedial legislation.

For the foregoing reasons, the Eighth Circuit's decision in *Farrow* should be disregarded either because it is erroneous or because it is moot, in view of the present, clarified sanction policy.

E. Respondents' Willful, Flagrant and Repeated Violations Warrant Civil Penalties Totaling $30,000.

The Act authorizes a civil penalty of not more than $10,000 for each violation. The Act provides (7 U.S.C. § 213(b)):

> (b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subsection (a) of this section, the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist. The Secretary may

> also assess a civil penalty of not more than $10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business.

The statute requires the Secretary to consider three factors in determining the amount of a civil penalty under the Act. As to the "gravity of the offense," as shown above, respondent's violations were extremely flagrant. Acting in a fiduciary capacity (for which they received $15,105.88 in commissions), respondents cheated their principals out of an additional $34,649.64 in fraudulent price increases, and about $5,000 more in fraudulent weight increases, which total 8,131 pounds (§ XI(B), *supra*).

As to the "size of the business involved," respondents are one of the largest livestock operations in the Pacific Northwest (Tr. 556), with gross receipts of $26,135,390 for their fiscal year ending August 31, 1982 (RX 104, p. 1, line 1(a)).

With respect to the "effect of the penalty on the person's ability to continue in business," the Department has always construed the Act as requiring a respondent to introduce evidence that a civil penalty would affect his ability to remain in business, if the respondent wished such factors considered. See, e.g., *In re Corn State Meat Co.*, 45 Agric. Dec. ____, slip op. at 53-55 (May 8, 1986); *In re Holiday Food Services, Inc.*, 45 Agric. Dec. ____, slip op. at 21-22 (May 8, 1986); *In re Saylor*, 44 Agric. Dec. ____, slip op. at 525 (Sept. 20, 1985) (decision on remand); *In re Trenton Livestock, Inc.*, 41 Agric. Dec. 1965, 1982 (1982); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 173 (1980). However, in *Bosma* v. *USDA*, 754 F.2d 804 (9th Cir. 1984), the court held that the Department has the burden of producing evidence as to the size of the business involved and the effect of the penalty on the person's ability to continue to do business.

We believe that the *Bosma* decision is erroneous, in this respect, for the reasons set forth in the Department's petition for rehearing in *Bosma*, which is set forth as an appendix to this decision.

In any event, however, the record in this case shows that civil penalties totaling $30,000 would not affect respondents' ability to continue in business.

But even if civil penalties totaling $30,000 would have adversely affected respondents' ability to continue in business, the penalty would still be warranted here because the record shows beyond question that respondents are totally corrupt in their livestock activities--beyond redemption. As stated in *In re Saylor*, 44 Agric. Dec. ____, slip op. at 525-26 (Sept. 20, 1985) (decision on remand):

> In addition, even if a $10,000 civil penalty would have an adverse effect on respondent's ability to continue in business,

> that would not be contrary to the statute, under the circumstances here. That is, the record in this case shows that respondent is corrupt in his livestock business activities. And when his fraudulent activities were detected, he fabricated records and offered perjured testimony in defense of his illegal conduct. Accordingly, it would be in the best interest of the livestock industry, and in the public interest, if respondent would choose another occupation, not subject to the ethical requirements of the Packers and Stockyards Act.
>
> The statute only requires that the Secretary "consider . . . the effect of the penalty on the person's ability to continue in business" (7 U.S.C. § 213(b)). It does not require that the Secretary refrain from imposing a civil penalty that would adversely affect the person's ability to continue in business where, as here, it is in the public interest that the respondent discontinue his livestock activities subject to the Act. [132]

It should be noted that $30,000 in civil penalties will not even take away respondents' ill-gotten gain from their fraudulent activities. Accordingly, civil penalties totaling $30,000 would be much too lenient except for the 10-year suspension order also being issued in this case.

If a reviewing court should disagree with the 10-year suspension order, the proceeding should be remanded to the Secretary in order to reconsider the appropriate amount of the civil penalties, based on the court's ruling as to the suspension order. As stated in *Saylor*, *supra* at 521, the "breach-of-trust violations each warrant a $10,000 civil penalty." If the civil penalties were to be increased, e.g., to $170,000, respondents would be permitted to pay the penalties over a period of years, as in *In re Welch*, 45 Agric. Dec. ____, slip op. at 34 (Sept. 25, 1986) ($10,000 payable over 3 years); and *In re Mid-West Veal Distributors*, 43 Agric. Dec. ____, slip op. at 44-45 (July 13, 1984) ($50,000 payable over 6 years).

For the foregoing reasons, the following order should be issued.

Order

Respondent Spencer Livestock Commission Company, its officers, directors, agents and employees, directly or through any corporate or other device, and respondent Mike Donaldson, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Engaging in any act, practice or course of business for the purpose of obtaining money from the purchasers of livestock by false or deceptive pretenses, or which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of livestock;

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[132] *Accord In re Corn State Meat Co.*, 45 Agric. Dec. ____, slip op. at 55-56 (May 8, 1986); *In re Holiday Food Servs., Inc.*, 45 Agric. Dec. ____, slip op. at 24-25 (May 8, 1986).

2. Misrepresenting to their principals or to other purchasers of livestock, or aiding and assisting any person to misrepresent to such persons, the original purchase prices, weights or shrinkage allowances of such livestock;

3. Preparing and issuing, or causing to be prepared and issued, in connection with the purchase or sale of livestock, accounts of purchases, invoices, billings or any other document showing false, inaccurate or misleading price, weight, or shrinkage allowance entries for such livestock;

4. Inserting or failing to insert in accounts of purchase, invoices, billings or any other document prepared in connection with the purchase or sale of livestock, any statement or information where such insertion or omission results, in whole or in part, in a false, inaccurate or misleading record of such livestock purchase or sale transaction;

5. Collecting payment from their principals or from other purchasers of livestock, or aiding and assisting any person to collect from such persons, on the basis of false, inaccurate or misleading invoices or billings;

6. Failing to provide, upon request, to principals for whom respondents have purchased livestock on a commission basis, the original scale tickets and purchase invoices for such livestock; and

7. Destroying accounts, records and memoranda which show the original purchase prices, weights, and shrinkage allowances of livestock purchased by respondents, or destroying any other record necessary to show the full and correct nature of any transaction involved in their businesses subject to the Packers and Stockyards Act, including but not limited to:

(a) Complete and accurate copies of invoices, accounts and bills for all livestock purchased;

(b) Scale tickets for all livestock purchased or sold on a weight basis;

(c) Complete and accurate copies of invoices, accounts and bills for all livestock sold;

(d) Deposit slips, bank statements, cancelled checks and drafts, and check stubs;

(e) A check register showing the check number, payee, date, and amount of each check issued by respondents for the purchase of livestock or for expenses relating to the purchase, sale, transportation or importation of livestock;

(f) Complete and accurate copies of invoices, accounts and bills for expenses related to livestock which have been purchased or sold by respondents;

(g) A livestock purchase journal detailing each livestock purchase to show the number and weights of the livestock, the prices paid, the expenses related to the purchase, transportation and importation of such livestock, and the charges, if any, made for buying or other services rendered; and

(h) A livestock sales journal detailing each livestock sale to show the number and weights of the livestock, the prices received therefor, the expenses related to the sale, transportation and importation of such livestock, and the charges, if any, for other services relating to such sale.

Respondents Spencer Livestock Commission Company and Mike Donaldson are suspended as registrants under the Act for a period of 10 years.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondents Spencer Livestock Commission Company and Mike Donaldson are jointly and severally assessed a civil penalty in the amount of $30,000. The civil penalty shall be paid by certified check made payable to the Treasurer of the United States, and mailed to the Assistant General Counsel, Packers and Stockyards Division, Office of the General Counsel, Room 2446-South, United States Department of Agriculture, Washington, D.C. 20250-1400, not later than the 90th day after service of this order on respondents.

The cease and desist provisions of this order shall become effective on the day after service of this order. The suspension provisions shall become effective on the 30th day after service of this order.

APPENDIX

USDA Petition for Rehearing in *Bosma v. USDA*, 754 F.2d 804 (9th Cir. 1984), *reprinted in In re Saylor*, 44 Agric. Dec. ____(Sept. 20, 1985) (decision on remand) (Appendix).

In re: DOUG WELCH, d/b/a W.W. GARRY, MICHAEL BENSON, MARLOWE K. BENSON, WAGNER-HUDSON LIVESTOCK MARKETING AGENCY, INC., ROGER D. KOCH CORPORATION d/b/a SWITZER-WAGNER & CO., and SWITZER-BAR 10, and ROGER D. KOCH. P. & S. Docket No 6537. Decision and order filed February 4, 1987.

ch act as a fraud or deceit—Civil penalty—Default.

'n, for complainant.

insky, Sioux City, Iowa, for respondent.

ied by William J. Weber, Administrative Law Judge.

DECISION AND ORDER WITH RESPECT TO MARLOWE K. BENSON AND WAGNER-HUDSON LIVESTOCK MARKETING AGENCY, INC. UPON ADMISSION OF FACTS BY REASON OF DEFAULT

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 et seq.), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act and regulations promulgated thereunder (9 C.F.R. § 201.1 et seq.).

Copies of the complaint and Rules of Practice (7 C.F.R. § 1.130 et seq.) governing proceedings under the Act were served upon respondents by the Hearing Clerk by certified mail. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute of all the material allegations contained in the complaint.

Respondents Marlowe K. Benson and Wagner-Hudson Livestock Marketing Agency, Inc., have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, as they pertain to respondents Marlowe K. Benson and Wagner-Hudson Livestock Marketing Agency, Inc., which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1.(a) Wagner-Hudson Livestock Marketing Agency, Inc., hereinafter referred to as respondent Wagner-Hudson was a corporation whose mailing address is c/o Marlowe Benson, 8601 Morningside Avenue, Sioux City, Iowa 51106.

(b) Respondent Wagner-Hudson was, at all times material herein:

(1) Until January 6, 1984, engaged in the business of buying and selling livestock in commerce on a commission basis and buying and selling livestock in commerce for its own acc

(2) Registered with the Secretary of Agric
buy and sell livestock for its own account and a
buy and sell livestock on a commission basis.

(c) Respondent Marlowe Benson was, at a
herein:

(1) President of and the primary stock
Wagner-Hudson;

(2) Responsible for the direction, management and control of respondent Wagner-Hudson; and

(3) Engaged in the business of buying and selling livestock in commerce on a commission basis and buying and selling livestock in commerce for his own account.

2. Respondent Wagner-Hudson, under the direction, management and control of respondent Marlowe K. Benson, knowingly and wilfully engaged in unfair and deceptive trade practices in that it entered into a conspiracy, combination and agreement for the purpose of defrauding consignors of livestock to respondent Wagner-Hudson.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, and pursuant to section 403 of the Act (7 U.S.C. § 222), respondents Wagner-Hudson and Marlowe Benson have wilfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213 (a)), and sections 201.56 and 201,61(a) of the regulations (9C.F.R. §§ 201.56, 201.61(a)).

Order

Respondent Wagner-Hudson, its agents and employees, directly or indirectly, through any corporate or other device, and respondent Marlowe K. Benson, his agents and employees, directly or indirectly, through and corporate or other device, shall cease and desist from:

1. Engaging in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale, on a commission basis or otherwise, of that person's livestock;

2. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding or course of business with any market agency selling livestock on a commission basis, or any employee or agent of such market agency for the purpose of purchasing consigned livestock at less than its fair or true market value;

3. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding or course of business with any market agency selling livestock on a commission basis, or any employee or agent of such market agency , which would enable such market agency, employee or agent to engage in any act or practice which operates or would operate as a fraud or deceit upon the consignors of livestock to such market agency;

4. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding or course of business with any market agency selling livestock on a commission basis, or any employee or agent of such market agency , to split or otherwise share in any profit derived from the resale of livestock purchased from consignments to such market agency;

5. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding or course of business with any market agency selling livestock on a commission basis, or any employee or agent of such market agency , which would enable such market agency, employee or agent to engage in any act or practice which operates or would operate as a fraud or deceit upon the market agency or its customers or principals; and

6. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding or course of business with any market agency selling livestock on a commission basis, or any employee or agent of such market agency , or an employee or agent of such market agency, or any employee or agent of such market agency to split or otherwise share in any profits derived from the sale of livestock sold to or brought on a commission basis for such market agency.

Respondent Marlowe K. Benson is hereby assessed a civil penalty of One Thousand Dollars ($1,000), payable in full by the effective date of this decision.

The provisions of this order shall become effective on the sixth day after this decision becomes final. Copies hereof shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service unless appealed within 30 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. § 1.130 et seq.).

[This decision and order became final March 20, 1987.—Editor.]

REPARATION DECISIONS

LYNN J. MAGELKY. *v.* KIST LIVESTOCK AUCTION COMPANY. P. & S. Docket No. 6594. Decision and order issued March 20, 1987.

Claimed "No Sale" agreement if livestock did not bring a minimum price—Complaint dismissed.

Jory M. Hochberg, Presiding Officer.

James D. Gion, Regent, North Dakota, for respondent.

Rauleigh D. Robinson, Bismarck, North Dakota, for respondent.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. § 181 *et seq.*). Complainant filed a formal complaint on April 24, 1985, alleging that on or about February 6, 1985, he had con signed 26 head of dairy cows to the respondent with the understanding that respondent would "no sale" the livestock if

they didn't bring at least $750.00 to $800.00 per head at the February 6, 1985, auction. Complainant alleges that respondent breached this agreement by selling the cows for an average amount per head of $497.00, and seeks damages of $7,020.00.

A copy of the investigative report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding pursuant to the rules of practice (9 C.F.R. § 202.101 *et seq.*) was served on the complainant. A copy of the complaint and the investigative report were served on respondent, who subsequently filed an answer and request for hearing which was served on the complainant. An oral hearing was held in Bismarck, North Dakota, on March 20, 1986. Complainant was represented by James D. Gion, Esquire, and respondent was represented by Rauleigh D. Robinson. Jory M. Hockberg served as Presiding Officer. Complainant called four witnesses and introduced one exhibit. Respondent called four witnesses and introduced three exhibits. At the hearing, the respondent moved to file an "Answer and Request for Oral Hearing" which was more explicit than the letter answer filed on respondent's behalf and which had been mailed by complainant's counsel to the Hearing Clerk and to respondent's counsel in a timely manner, but had not been included in the Hearing Clerk's file. There being no objection, respondent's motion to file this pleading as an amended answer was granted. At the conclusion of the hearing, respondent also filed a "Final Argument" which was personally served on the complainant. Both parties filed post hearing briefs.

Findings of Fact

1. Lynn J. Magelky, hereinafter referred to as the complainant, is an individual whose business address is Rural Route, New England, North Dakota. Complainant is engaged in the business of farming and ranching.

2. Kist Livestock Auction Co., hereinafter referred to as the respondent, is a corporation whose business mailing address is Drawer K, Mandan, North Dakota 58554. At all times material herein, respondent was engaged in the business of conducting and operating the Kist Livestock Auction Company stockyard, a posted stockyard under the Act and selling livestock on a commission basis at the stockyard. Respondent at all times material herein was registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis at the stockyard.

3. On or about February 3 and 4, 1985, complainant called the respondent's place of business on two separate occasions. On the first occasion, complainant spoke to respondent's solicitor to inquire what prices dairy cows had sold for at respondent's recent dairy sale. Complainant was given information concerning the prices both top quality

and mediocre dairy cows brought at this sale. During the second telephone call, complainant spoke to respondent's office manager. Complainant again asked for and received information concerning the prices dairy heifers had brought at respondent's recent dairy sale, and arranged to consign his livestock at the next scheduled sale on February 6, 1985, which was not a dairy sale.

4. Complainant arranged to have the livestock trucked to the sale and planned to attend the sale himself. However, complainant was late arriving at the sale and learned his livestock had already been sold. Complainant then asked the office manager to not sale the livestock which he had consigned, but was told it was too late.

5. The twenty-six head consigned by complainant on February 6, 1985, were sold in seven separate lots to seven different buyers at an average amount per head of $497.00.

6. It is not unusual for respondent to receive requests from consignors to "no sale" their livestock unless a specific minimum price is bid. Respondent's managers are normally willing to enter into such agreements, and attempt to insure that such agreements are not breached.

7. The complaint in this proceeding was filed within 90 days of the accrual of the cause of action.

Conclusions

The salient issue in this case is whether complainant clearly communicated to respondent that he desired to "no sale" his 26 dairy heifers before they were actually sold at auction. Complainant's evidence fails to carry his burden of proof that he had an express agreement for respondent to no sale the heifers if they didn't bring a specified minimum price. Of great relevance on this issue is a letter dated February 12, 1985, from complainant's counsel to respondent. This was complainant's first written offer to attempt to settle the dispute without "recourse to legal remedies." In it, complainant, who personally received a copy of this letter without apparently ever questioning its accuracy, stated that he "*indicated* to [the respondent] that he was selling heifers off the farm for $900.00/head . . . and was *led to believe* that selling at your market would bring a price somewhere in that neighborhood." (Emphasis added) In this letter, complainant does not claim that the parties had entered into a prior no-sale agreement, but states simply that ". . . Mr. Magelky feels he should have been allowed to no-sale the animals. He tried to do so, but was informed by Kist that he was too late. However, it appears the proper thing to be done was for the auction market to hold the cattle back pending approval of the sale by the owner, especially when he looks at a price that is only 55% of the expected amount."

Complainant claims that the tone and phraseology of this letter was simply an attempt not to be "abrasive or argumentative" in order to facilitate a settlement of this matter. This contention cannot be ac

cepted. I can only conclude that complainant's legal agent was accurately relaying complainant's statements to him and would not have stated that complainant was "led to believe" he would obtain a price "somewhere in that neighborhood" if the complainant had an express prior agreement for respondent to no sale the animals unless they brought a specified minimum price. Indeed, the complaint filed in this proceeding signed by complainant similarly fails to specifically allege the existence of a prior agreement to no-sale the animals if they didn't bring a specified minimum price. Instead, complainant alleges in the complaint that he "told them on the phone that I wanted at least $750 to $800 for the cows I would bring up." Complainant then computes his damages by claiming that he should have received $770/head, which is apparently an average figure from the range he claims to have quoted to respondent.

Respondent's witnesses lend further support to the conclusion that there was no prior no-sale agreement for the 26 head in issue. Respondent's solicitor and office manager both testified clearly and certainly that complainant never requested such an arrangement during their telephone conversations with him. Respondent's office manager gave further credible testimony concerning the efforts of the market to abide by no-sale agreements and the unlikelihood of failing to honor such an agreement on a consignment as large as 26 head. In fact, the testimony of respondent's witnesses is very much in accord with the contentions in complainant's February 12, 1985, letter . Accordingly, I find that the parties did not enter into a no sale agreement and respondent was guilty of no unlawful act or practice in the receipt, handling and marketing of complainant's consignment.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 C.F.R. § 202.117.

Order

Accordingly, the complaint in this proceeding is hereby dismissed.

PLATTE VALLEY LIVESTOCK, INC. v. CB LIVESTOCK, INC. P. & S. Docket No. 6574. Decision and order issued March 11, 1987.

Failure to pay and failure to pay when due—Issuing insufficient funds checks.

Allan R. Kahan, Presiding Officer.

Complainant, *pro se*.

Respondent, *pro se*.

Decision and order issued by Donald A. Campbell, Judicial Officer.

DEFAULT DECISION AND ORDER

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. § 181 *et seq.*), instituted by the filing of a formal complaint on April 29, 1985. Complainant alleges that it sold a total of 266 head of livestock to respondent on March 5, 1985, and that respondent issued an insufficient funds (NSF) check for the livestock which was replaced by three checks, one of which was not accepted by the bank because the account was closed by the bank for lack of funds. The amount claimed was $17,278.64.

Copies of the complaint and of the investigative report prepared by the Packers and Stockyards Administration of the Department and filed in this proceeding pursuant to the rules of practice (9 C.F.R. § 202.14(c)) was served on respondent on May 20, 1985.

At the time of service of the copies of the complaint and investigative report, respondent was notified that an answer thereto should be filed within 20 days after service and that failure to file an answer would be deemed an admission of the allegations contained in the complaint which would result in the issuance of a default order without oral hearing, as provided in the rules of practice at 9 C.F.R. § 202.106(d). No answer was filed by respondent.

The failure of respondent to file an answer within the specified time limit is deemed an admission of all the allegations of the complaint and a consent to the issuance of the final order in the proceeding, based on all the evidence in the record, including information contained in the investigative report.

On the basis of the record, it is found that on March 5, 1985, respondent purchased 266 head of livestock from complainant and in purported payment therefor, issued a check for $97,278.64 which was returned unpaid because there were insufficient funds in the account on which the check was drawn to pay the check when presented. It is further found that on March 28, 1985, respondent exchanged the one check in the amount of $97,278.64, for three (3) checks, two checks in the amount of $40,000.00 each, and one check in the amount of $17,278.64. Both checks for $40,000.00 cleared respondent's bank. However, the check for $17,278.64 was returned as the bank had closed respondent's account because of lack of funds. Such amount remains due and owing to complainant. It is further found that at the time respondent was engaging in business as a dealer buying and selling livestock for its own account in commerce and so registered with the Secretary under the Act. It has been consistently held that failure to pay and failure to pay, when due, for livestock, constitutes an unfair practice under section 312(a) of the Act (7 U.S.C. § 213(a)). *Mid States Livestock, Inc., Dale E. Van Wyk and Gordon Reisinger*, 37 Agric. Dec. 547 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978). It has been held that under such circum

stances the Act authorizes a reparation order. *Rice v. Wilcox*, 630 F.2d 586, 39 Agric. Dec. 883 (8 Cir. 1980).

The Act provides a 90-day time limit for filing such complaints. Complainant filed its complaint within the limit.

The decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 C.F.R. § 2.35, 42 F.R. 4395, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c-450g. See also Reorganization Plan No. 2 of 1953 (5 U.S.C., 1976 E., appendix p. 764). It constitutes an "order for the payment of money" within the meaning of section 309(f) of the Act (7 U.S.C. § 210(f)).

Under that section, if respondent does not comply with this order within the time limit in this order, complainant may within one year of the date of this order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of respondent, or in any state court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and this order in the premises. That section further provides that such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders herein shall be *prima facie* evidence of the facts herein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. That section further provides that, if the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

It is requested that copies of all pleadings filed by any party in any such suit be filed with the Hearing Clerk, USDA, Washington, D.C. 20250, for inclusion in the file on this reparation proceeding. It is further requested that if the construction of the Act, or the jurisdiction to issue this order, becomes an issue in any such suit, prompt notice of such fact be given to the Office of the General Counsel, USDA, Washington, D.C. 20250.

On a petition to reopen a hearing, or rehear or reargue a proceeding, or to reconsider an order, see rule 17 of the Rules of Practice, 9 C.F.R. § 202.117, 43 F.R. 30517, July 14, 1978.

On a respondent's right to judicial review of such an order, see *Maly Livestock Commission v. Hardin, et al.*, 446 F.2d 4, 30 Agric. Dec. 1063 (8 Cir. 1971). On a complainant's right to judicial review of such an order, see 5 U.S.C. 702-3 and *United States v. ICC*, 337 U.S. 426.

Order

Within 30 days of the date of this order, respondent shall pay to complainant the sum of $17,278.64 plus interest thereon at the rate of 13% per annum from June 1, 1985, until paid.

Copies hereof shall be served upon the parties.

FRANK B. TITTSWORTH AND JAN TITTSWORTH d/b/a TITTSWORTH LIVESTOCK *v.* CUSTOM CATTLE COMPANY, INC. P&S Docket No. 6473. Decision and order issued March 11, 1987.

Evidence in direct conflict and irreconcilable as to certain issues of fact—Complainant's contentions as to those facts not established by a preponderance of the evidence—Complaint dismissed.

John J. Casey, Presiding Officer.

J. Hilton Coonger, Smithville, Tennessee

James K. Dukes, Hattiesburg, Mississippi, for respondent.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 *et seq.*) begun by a complaint received on May 18, 1984, alleging in substance failure to pay in full for livestock purchase d and received. The amount claimed was $27,554.00.

Copies of the complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding pursuant to the Rules of Practice, were served on respondent on September 27, 1984. A copy of the investigation report was served on complainants on the same day. An answer and request for oral hearing was received from respondent timely after an extension of time. A copy thereof was served on complainants on November 21.

An oral hearing as requested was held on April 2, 1985 in Birmingham, Alabama, and on August 13 in Chattanooga, Tennessee, before John J. Casey of the Office of the General Counsel of this Department. Complainants were represented by J. Hilton Conger, Esq., Smithville, Tennessee. Respondent was represented by James K. Dukes, Esq., Hattiesburg, Mississippi. Both complainants and three witnesses testified. Seven exhibits were received. No brief was received.

It is undisputed that on April 28, 1984 complainants sold and shipped certain cattle to respondent, and that the latter stopped payment on the check given in payment and wire-transferred a lesser amount. Respondent contended that this was justified on the basis that complainants did not pay it for certain cattle shipped to them the month before.

It is undisputed that in March, 1984, respondent shipped certain cattle from Indiana to complainants, and that the latter did not transmit or deliver anything to respondent as payment for them. Complainants contended that t hose cattle were shipped to them to sell and apply the

proceeds to a debt owed to them by respondent on account of certain cattle they shipped to it a few weeks before that, for which they were not paid and for certain deductions taken on certain other cattle for they were paid at least in part.

It is undisputed that, in the week of February 15, 1984, two shipments of cattle went from complainants to respondent and payment was made at least in part. The parties differ as to whether the payment was all that was owed , and whether there was a third shipment that week, on the 15th.

The evidence is in direct conflict and irreconcilable as to certain issues of fact. Complainants' contentions as to those facts were not established by a preponderance of the evidence.

As to whether there was a February 15 shipment, complainant Frank Tittsworth testified that it was ordered by respondent's agent A.A. "Bud" Cervantes in a phone call which Mr. Tittsworth received at Unionville, Tennessee, an d shipped that day from there to respondent's place of business in Purvis, Mississippi. Mr. Cervantes testified that no such phone call took place, that he did not otherwise place such an order, and that he was at respondent's place of business every day that week and no such shipment was received. Both appeared to be credible when they testified.

Investigation report Exhibit 3 is an affidavit dated August 15, 1984, reading as follows:

> My name is Frank Garretson. I live in Viola, Tenn. I haul cattle for Frank Tittsworth. On Feb. 13, 15 and 17 of 1984 I helped load cattle for Mr. Tittsworth. These cattle were delivered to Custom Cattle Co. of Purvis, Mississippi on trucks owned by myself.

Complainant's Exhibit 7 is another affidavit, dated April 1, 1985, reading as follows:

> My name is Foster Turner. I live in McMinnville, Tennessee. I work as a truck driver for Frank Garretson. On February 15, 1984, I helped load cattle for Mr. Frank Tittsworth. I personally drove the truck and delivered the cattle to Custom Cattle Company of Purvis, Mississippi.

Neither Mr. Garretson nor Mr. Turner testified, nor did anyone else connected with such a trucking enterprise. Notwithstanding that Mr. Garretson's affidavit was signed six months after February 15, 1984, and Mr. Turner's affidavit was signed more than a year after then, no business record of the trucking enterprise on which they might have relied to refresh their memories was offered or received. Also, complainant Frank Tittsworth testified that the truck driver phoned him at his home in Tennessee upon arrival at respondent's place of business in Mississippi that night. No phone bill showing such a call was offered or received.

As for the March shipment, complainant Frank Tittsworth testified that Robert Ledford as respondent's agent told him to sell the animals and keep the proceeds on account of a February 15 shipment and certain deductions respondent made on the two shipments which were undisputedly made that week. Mr. Ledford testified that the animals shipped to complainants in March were sold to them with full payment expected promptly. Both appeared to be credible when they testified.

It is undisputed that, in mid-April of 1984, a meeting took place, of complainants and respondent's president Oscar Black, and that they reviewed the records of the recent transactions between complainants and respondent in the week of February 15 and in March. Complainants testified that Mr. Black agreed that respondent owed complainants a few thousand dollars and promised to pay it promptly. Mr. Black testified that complainants agreed that they owed respondent the money which respondent later withheld on the April 28 transaction, that he (Mr. Black) agreed to place orders with complainants and apply the commissions to the debt, but he was overruled by his employers who insisted on the offset which was taken on the April 28 transaction. Both complainants and Mr. Black appeared to be credible when they testified.

It is undisputed that in that meeting some six or seven pages were prepared, detailing the course of dealings up to then between complainants and respondent. The case record contains some of those pages but not all of them, and contains none showing a third shipment from complainants to respondent in the week of February 15, or that Mr. Black agreed that complainants did not then owe money to respondent on account of the March shipment.

No subpoena was requested or issued in this case.

Respondent has a burden to establish justification for its failure to pay in full for the cattle shipped in the April 28 transaction in dispute. However, it being undisputed that complainants did not transmit or deliver payment to respondent for cattle they received from respondent in March, that burden of respondent was carried. Thus the burden is on complainants to show, as they contended, that the March cattle were shipped to them to satisfy a debt incurred in February. The complaint must be dismissed since the evidence in the record does not support a conclusion about that, one way or the other.

This order is the same as an order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 C.F.R. § 2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c–450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1982 Ed., App. pg. 1068.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 C.F.R. § 202.117.

On a complainant's right to judicial review of such an order, see 5 U.S.C. 702–3 and *United States v. I.C.C.*, 337 U.S. 426 (1948).

The complaint herein is hereby dismissed.

Copies hereof shall be served on the parties.

COURT DECISIONS

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GILARDI TRUCK & TRANSPORTATION, INC., Defendant-Appellant. Case No. 86-3371. Decided and filed March 19,1987. [See USDA PACA Docket No. 2-6186, 43 A.D. 118.]

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

On Appeal From The United States District Court, Southern District Of Ohio.

BEFORE: MERRITT, WELLFORD, and MILBURN, Circuit Judges.

WELLFORD, Circuit Judge. This action arises under the Perishable Agricultural Commodities Act, 7 U.S.C.A. §§ 499a-499s (1980) (hereinafter PACA). Pursuant to 7 U.S.C. Sections 499c(a) and 499h(d), on March 7, 1984, the United States of America commenced this action against Gilardi Truck and Transportation, Inc., appellant, to recover civil penalties in the amount of $3,300.00 and permanently to enjoin the appellant from conducting business without a valid license under the Act. Appellant answered and demanded a jury trial. Following an initial pretrial conference, the district court referred the matter to the magistrate.

The government filed a motion for summary judgment. The magistrate, on reference, issued his report and recommendation granting appellee's motion for summary judgment and awarding the relief sought in the complaint. Appellant filed a motion to review the magistrate's report and recommendation. The district court adopted the report and recommendation of the magistrate in its entirety, and entered judgment against the appellant in the amount of $3,300.00. In addition, it permanently enjoined appellant from carrying on or engaging in business as a commission merchant, dealer or broker in perishable agricultural commodities in interstate or foreign commerce without holding an effective license under PACA. This appeal ensued.

Appellant Gilardi was licensed under PACA to do business as a commission merchant, dealer, or broker of perishable agricultural commodities in interstate or foreign commerce, a mandatory requirement under the Act. (7 U.S.C.A. Section 499c).

Robert Ruiz, Inc. filed a complaint with the Department of Agriculture seeking reparation from Gilardi for its failure to pay monies owed for past transactions involving produce shipped in interstate commerce. Gilardi was properly served with the complaint, but filed no answer. Accordingly, on November 30, 1982, a default order was entered in the proceeding against Gilardi ordering it to pay the reparation award plus interest due thereon within thirty days. A similar complaint filed by Mo-Bo Enterprises, Inc. against Gilardi resulted in the entry of a

second default order on December 17, 1982. This entry also ordered Gilardi to pay the award within thirty days.

Each of these default orders was sent to appellant Gilardi by certified mail, return receipt requested, on the day the order issued. Each was attached to a cover letter which notified Gilardi that unless it advised the Department of Agriculture in 30 days that it had paid the reparation award, or that it had filed an appeal in district court, Gilardi's license would be automatically suspended. Appellant did not appeal these awards.

On January 6, 1983, the Department of Agriculture sent a telegram notifying Gilardi that its license would be suspended at the time previously specified (January 7, 1983) and would remain suspended until the reparation award was fully satisfied. The award to Ruiz was satisfied on February 18, 1983; the award to Mo-Bo Enterprises, Inc. was not satisfied until May 5, 1983. Appellee contends that pursuant to 7 U.S.C.A. Section 499g, Gilardi's license was therefore under suspension by operation of law from January 7, 1983 through May 5, 1983. Appellant does not dispute this but contends that it would validly operate after May 5, 1985.[1]

Appellant alleges that material questions of fact exist so that this case should not have been resolved in a summary manner. First, he contends that this action is improper since the administrative agency order now under appeal was issued over a year after the default orders were satisfied. Appellee responds, however, that the purpose of this action is not to enforce the reparation orders, but rather to penalize appellant for operating while its license was under suspension. We conclude that whether or not reparation awards have been subsequently satisfied is immaterial to this action.

Title VII, U.S.C.A., Section 499g(c) provides for the automatic suspension of a PACA license where a licensee fails to fully and promptly

[1] At oral argument we are advised of a subsequent revocation order. Apparently, the government has not sought to enforce this.

pay a reparation order unless the licensee appeals. [2] *See also Abe Rafelson Co. v. Tugwall*, 79 F.2d 653, 654-55 (7th Cir. 1935) ("a failure to satisfy the reparation order or to perfect an appeal shall automatically bring about a suspension of the license"). PACA should be strictly construed against the government and in favor of the defendant. *United States v. Solomon*, 3 F.R.D. 411 (E.D. Ill. 1944). The evidence clearly shows that Gilardi did not satisfy the reparation orders within the proper time nor did he appeal, therefore his license was effectively and automatically suspended under the Act.

> The Perishable Agricultural Commodities Act is admittedly and intentionally a "tough" law. It was enacted in 1930 for the purpose of providing a measure of control and regulation over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct and unfair methods are numerous. The law was designed primarily for the protection of the producers of perishable agricultural products-most of whom must entrust their products to a buyer or commission merchant who may be thousands of miles away, and depend for their payment upon his business acumen and fair dealing-and for the protection of consumers who frequently have no more than the oral representation of the dealer that the product they buy is of the grade and quality they are paying for.

United States v. William B. Mandell Co., 242 F. Supp. 873, 875 (E.D. Pa. 1965). The purpose of the PACA penalties, [3] is to protect producers and consumers from "sharp practices" and "irresponsible business conduct." *Id.* at 875. Appellant has failed to pay awards assessed against it in a timely fashion. There is a "clearly recognized need to have financially responsible persons as licensees . . . under [the] Act." *Marvin Tragash Co. v. United States Dept. of Agriculture*, 524 F.2d 1255, 1257 (5th Cir. 1975) (quoting *Zwicx v. Freeman*, 373 F.2d 110,

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[2] Title 7, U.S.C.A., Section 499g(d) provides:

Suspension of license for failure to obey reparation order or appeal

(d) Unless the licensee against whom a reparation order has been issued shows to the satisfaction of the Secretary within five days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order his license shall be suspended automatically at the expiration of such five-day period until he shows to the satisfaction of the Secretary that he has paid the amount therein specified with interest thereon to date of payment: Provided, That if on appeal the appellee prevails or if the appeal is dismissed the automatic suspension of license shall become effective at the expiration of thirty days from the date of the judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied.

116-17 (2d Cir.), *cert. denied,* 389 U.S. 835 (1967)). Appellant, moreover, continued to operate while his license was suspended in open violation of the Act, the type of behavior that PACA is designed to penalize.

The unfortunate fact that appellant's business is facing bankruptcy does nor militate against the imposition of a fine or injunction for violation of the Act. In *Melvin Beene Produce Co. v. Agricultural Marketinq Service,* 728 F.2d 347, 351 (6th Cir. 1984), we held that bankruptcy proceedings do not affect the Secretary's ability to revoke a PACA license under 7 U.S.C. Section 499h(a) where the defendant had failed to promptly pay sellers with which it dealt. We stated that Congress had specifically amended Section 525 of the Bankruptcy Act "in order to authorize continuation of the Secretary's license revocation authority under PACA when the violations involve debts dischargeable in bankruptcy." *Id.* at 351. *See also Quinn v. Butz,* 510 F.2d 743 (D.C. Cir. 1975); *Re Fresh Approach, Inc.,* 49 Bankr. 494 (N.D. Tex. 1985) ("The mere filing of a bankruptcy petition does not prevent the Secretary of Agriculture from discharging his or her statutory duties under PACA, one of which is denial of a license to a financially insecure applicant").

Appellant also argues that the injunction is a harsh remedy and violates his due process rights. By operating without an effective license, appellant Gilardi's operations were illegal. No due process rights are therefore violated by an injunction under these circumstances. Nothing prohibits appellant from conducting business in commodities other than perishable agricultural commodities, or from operating in a legal fash-

[3] Title 7, U.S.C.A., section 499c(a) provides in part:

> (a) After December 10, 1930, no person shall at any time carry on the business of a commission merchant, dealer, or broker without a license valid and effective at such time. Any person who violates any provision of this subsection shall be liable to a penalty of not more than $500 for each such offense and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil suit brought by the United States.

Title 7, U.S.C.A., section 499h(d) provides:

> (d) In addition to being subject to the penalties provided by section 499c(a) of this title, any commission merchant, dealer, or broker who engages in or operates such business without a valid and effective license from the Secretary shall be liable to be proceeded against in any court of competent jurisdiction in a suit by the United States for an injunction to restrain such defendant from further continuing so to engage in or operate such business, and, if the court shall find that the defendant is continuing to engage in such business without a valid and effective license, the court shall issue an injunction to restrain such defendant from continuing to engage in or to operate such business without such license.

ion. The equities weigh in favor of an injunction prohibiting the appellant from selling perishable agricultural commodities since the Act ,is designed to prevent financially troubled businesses from dealing in this industry. *See United States v. Diapulse Corp.*, 457 F.2d 25, 29 (2d Cir. 1972).

While appellant questions the validity of the administrative proceeding, there is no administrative proceeding or order upon which to question validity since civil penalties and injunctions under PACA are matters brought directly to and decided in federal court, and because the suspension of Gilardi's license was automatic. There is no merit to this contention.

Appellant also submits that he did not receive adequate notice of the suspension of his license. Attached to appellee's brief is an affidavit with attachments of return receipt cards evidencing notification to Gilardi of the reparation orders. One letter dated November 30, 1982 states that "[u]nless we are advised of payment of the reparation award or that an appeal has been filed in the United States District Court, the order becomes final on December 30, 1982. If the order becomes final and the reparation award is not paid, your license will be automatically suspended effective close of business on January 7, 1983 . . . ." Another letter dated December 17, 1982 indicates that the award will become final on January 16, 1983 and if no payment is made by that date or an appeal made, then the license will be automatically suspended on January 21, 1983. These letters, along with the telegram sent January 6, 1983, also a part of the record, constitute adequate notice to appellant.

Appellant asserts that the time limit for the government to bring this action has expired. The action was commenced on March 7, 1984; the last reparation award was satisfied on May 5, 1983. There is a five year time limitation set out in 28 U.S.C.A. Section 2462 for commencement of an action for the collection of civil penalties. As to the claim of laches see *Melvin Beene Produce Co.*, 728 F.2d at 349–50 (PACA's nine month limit in Section 499f(a) [4] for the bringing of an action only applies to suits for reparation awards and not to disciplinary actions by the Secretary). In any event, the Secretary brought this action within one year of the violation, and we find this to be a reasonable time.

Finally, appellant cites *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425 (6th Cir. 1962), as controlling for the proposition that summary judgment is inappropriate in this case. Appellant has

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[4] Section 499f(a) provides in part:

(a) Any person complaining of any violation of any provision of section 499b of this title by any commission merchant, dealer, or broker may, at any time within nine months after the cause of action accrues, apply to the Secretary by petition . . . .

failed to show any specific issues of disputed fact which were unresolved in the court below. The business operations in *Bohn* were legal, and that case was concerned only with whether the defendant was *conducting* business. We find *Bohn* to be distinguishable and not controlling; appellant has failed to meet its burden of proof under *Celotex Corp. v. Catrett*, ____ U.S.____, 106 S. Ct. 2548 (1986), that any genuine issue of material fact exists.

Under Federal Rule of Civil Procedure 56(e), the appellant is required to counter appellee's affidavit with some evidence that he did not conduct business during the license revocation period. [5] The Supreme Court in *Celotex*, 106 S. Ct. at 2553, held that where a nonmovant party bears the burden of proof on an issue at trial, "Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " Since appellant did not support his denial with affidavits or other evidence that set out some disputed material fact, summary judgment on this issue is appropriate.

We accordingly AFFIRM the judgment of the district court.

UNITED STATES OF AMERICA *v.* VINCENT D. MAENZA, d/b/a VINCENT MAENZA BANANA CO., a/k/a MAENZA & SONS. Civil Action No. 87-0586. Order filed March 25, 1987.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ORDER

Considering the following,

That the United States of America having filed its Complaint demanding the payment of a civil penalty and the issuance of an injunction as appears more fully by the said Complaint and the prayer for

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[5] Fed. R. Civ. P.56(e) states in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

As stated in the annotation to the rule, "[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial."

relief contained therein, and the Court having issued a preliminary injunction, and the defendant, by and through his counsel, having represented to the Court that he has received a copy of the Complaint filed herein, and has read and understands the allegations contained therein, and represents to the Court that he has nothing to rebut said evidence and on motion of the United States of America for the issuance of a permanent injunction;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the Court has jurisdiction of the subject matter hereof and of all persons and parties hereto, and the Complaint states a cause of action against the defendant under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*).

2. That the defendant, his agents and employees, and all persons in active concert or participation with him, be and hereby are permanently enjoined and restrained from engaging in, or carrying on, or operating in the produce business as a dealer, broker or commission merchant in interstate or foreign commerce within the meaning of such terms as they are defined in the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), without holding a license that is valid and effective under it.

3. That the defendant shall establish a separate interest bearing account for the benefit of unpaid sellers of produce under 7 U.S.C. § 499e(c) and to deposit in such account collections of receivables generated by the sale of commodities referred to in paragraph 2.

4. That the defendant pay to the United States of America $3,550.00 as a civil penalty under 7 U.S.C. § 499c(a).

5. That this Court shall retain jurisdication for the purpose of enforcing this decree and for the purpose of granting such additional relief as may hereafter appear necessary or appropriate.

In re: Carpenito Bros., Inc., a/t/a 5 C's Fruit & Produce. PACA Docket No. 2-6846. Decision and Order filed March 26, 1987.

Failure to make full payment promptly—Implied agreements for delayed payment—Regulations require express agreements for delayed payment—Revocation of license—Publication of the facts.

Summary: The Judicial Officer reversed Judge Baker's order, which imposed a 30-day (suspended) suspension order because respondent failed to pay promptly 22 sellers $209,339.32 for 523 lots of produce purchased from February 1983 through December 1984. The Judicial Officer revoked respondent's licensed on the basis of *In re Gilardi Truck & Transportation, Inc.* 43 Agric. Dec. 118 (1984). The ALJ should require counsel to separately number each page of a multi-page exhibit. Respondent's evidence shows that respondent had only implied agreements for delayed payment terms, while the regulations require express agreements. Unsworn letters signed by respondent's suppliers, which were prepared by respondent's attorney, stating that they had express agreements for delayed payment, have no probative value. Respondent had burden of proving that it had express agreements for delayed payment. A party should call at least 2 or 3 witnesses handling a substantial number of transactions to prove the presence or absence of express agreements for delayed payment. If parties had express agreements for payment within a "reasonable" time, prior to the Secretary's new regulations effective December 20, 1984, the Judicial Officer would have held any payment beyond 45 days (or at least beyond 60 days) was not made within a "reasonable" time. After the new regulations, he would hold that a "reasonable" time for credit does not exceed 30 days, unless there are other provisions in the agreement shedding light on the meaning to be attributed to the term "reasonable." Under *Gilardi*, respondent's license should be revoked for a slow-payment violations unless by the time of the hearing, respondent had made full payment and was in present compliance with the payment provisions of the Act and regulations. The ALJ erroneously excluded evidence showing that respondent was not in present compliance with the payment provisions. Respondent was notified that its present compliance would be at issue by the *Gilardi* decision and also by the general allegations of the complain that respondent "has engaged in, is engaging in, and will continue to engage in, a course of conduct which involves failure to made full payment promptly. . . ." Complainant's offer of proof as to respondent's noncompliance at the time of the hearing was received as evidence in the case. Respondent admittedly had no written agreements for delayed payment and, therefore, during the period immediately prior to the hearing, respondent was in violation of the prompt-payment provisions because it was bound by the 10-day rule. Although the existence of implied agreements for delayed payment is a mitigating circumstance with respect to violations specifically alleged in the complaint, the existence of implied agreements are irrelevant in determining present compliance with the payment provisions for the purpose of reducing a sanction from revocation to suspension under the *Gilardi* holding. The ALJ erred in concluding that complainant should have introduced respondent's balance sheets, profit and loss statements, and a cash flow analysis in order to determine whether a revocation order should be issued under the *Gilardi* holding. The Judicial Officer announced a new policy that in future cases involving repeated and flagrant slow-payment violations, respondent's license will be revoked, rather than suspended, unless full payment has been made by the opening of the hearing, together with present compliance with the payment provisions, and respondent's present compliance must not involve credit agreements for more that 30 days.

Ben E. Bruner, for complainant.

Stephen McCarron, Silver Spring, Maryland, for respondent.

Initial decision by *Dorothea A. Baker, Administrative Law Judge.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), in which Administrative Law Judge Dorothea A. Baker (ALJ) filed an initial Decision and Order on April 25, 1986, suspending respondent's license for 30 days for failure to pay promptly 22 sellers $209,339.32 for 523 lots [1] of produce purchased and accepted in interstate commerce from February 1983 through December 1984. [2] The ALJ suspended the suspension, however, "during those times that Respondent is in full compliance with the Act" (Initial Decision at 21) "for a one year period following the effective date of this Order" (Clarification of Order filed May 19, 1986).

On May 30, 1986, complainant appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35). [3] On July 8, 1986, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record, I am revoking respondent's license, as requested by complainant. Findings 1, 2, 5 and 7 are taken virtually verbatim from the ALJ's Findings 1, 2, 17 and 18, respectively.

Findings of Fact

1. Respondent, Carpenito Bros., Inc., a/t/a 5 C's Fruit & Produce, is a Massachusetts corporation whose address is 165 Market Street, Everett, Massachusetts 02149.

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[1] The last transaction in the complaint is numbered Transaction No. 522, but there are two transactions (erroneously) numbered 405.

[2] *See generally* Campbell, *The Perishable Agricultural Commodities Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 4 (1981 and 1986 Cum. Supp.), and Becker and Whitten, *Perishable Agricultural Commodities Act*, in 10 Harl, Agricultural Law, ch. 72 (1980).

[3] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

2. Pursuant to the licensing provisions of the PACA, License Number 671239 was issued to respondent on January 11, 1966. This license was renewed annually and is next subject to renewal on or before January 11, 1988.

3. During the period February 1983 through December 1984, respondent purchased, received, and accepted 523 lots of perishable agricultural commodities from 22 sellers in interstate commerce, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $209,339.32. While this balance was paid in full prior to the hearing, such debt was not paid in conformity with the credit provisions of the sellers. The details of these transactions are set forth in paragraph 6 of the complaint.

4. Respondent was 1 to 16 months late in making full payment of the agreed purchase prices of the 523 lots of produce referred to in Finding 3, and respondent was 6 to 16 months late in over half of those transactions (CX 1).

5. By notice in writing, dated November 4, 1982, respondent was informed that failure to make full payment promptly of the agreed purchase prices for perishable agricultural commodities received and accepted in interstate or foreign commerce is a violation of the PACA. Respondent was given the opportunity to demonstrate or achieve compliance with all lawful requirements of the PACA, but has failed to do so.

6. The notice referred to in Finding 5 was signed by J. J. Gardner, Chief, Regulatory Branch, Fruit and Vegetable Division, and stated, *inter alia:*

> The purpose of this letter is to inform you fully of the prompt pay requirements of the Act and the consequences of violating these requirements. Failure to make full payment promptly of the agreed purchase prices for perishable agricultural com-

> of proving your claim. Therefore, it would be to your advantage to be sure that an agreement as to time of payment is reduced to writing when the terms of sale are agreed upon.

7. The acts of the respondent, in failing to make full payment promptly in accordance with its credit arrangements with its suppliers for perishable agricultural commodities it purchased, received, and accepted, constitute willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. § 499(b)).

Conclusions

Respondent's violations are similar, but even more numerous, than the slow-payment violations involved in *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. ____ (Jan. 27, 1984), attached as an appendix to this decision. [4] The relevant provisions of the Act and regulations are set forth in *Gilardi* (slip op. at 3–6). (A reading of the entire *Gilardi* decision, prior to reading this decision, will be helpful to anyone not familiar with the PACA regulatory program.) It is explained in *Gilardi* that numerous slow-payment violations, in which payment is delayed for a number of months, warrant an order revoking the license of the violator (slip op. at 6–33, 38–49).

However, in *Gilardi*, a new policy is set forth stating that if full payment is made by the "opening of the hearing, together with present compliance with the payment provisions of the Act and regulations" (slip op. at 44), the case will be considered as a "slow pay" case, warranting a lengthy suspension order, rather than a "no pay" case, warranting a revocation order. Specifically, it is stated in *Gilardi* (slip op. at 43–44):

> There are substantial reasons for making the final determination as to whether a case is "slow pay" or "no pay" as of the date on which the administrative hearing begins. Any determination made after that time would require a new investigation by complainant which might unduly delay the proceeding. Each day that the payment violations continue results in increased risk and damage to the industry. The increased damage to existing creditors is obvious--they are forced to wait longer for their money. The increased risk to others arises from the fact that a firm in financial difficulty frequently increases its volume significantly, perhaps taking imprudent chances, thereby exposing many other unsuspecting persons to the risk of nonpayment, if the debtor's efforts to regain financial stability are unsuccessful. Since there is a considerable time lag between the violations and the hearing, there is no real

[4] *Gilardi* also involved a failure to pay for $68,568.05 worth of produce, which it expected to pay in full within a few days after the filing of its appeal to the Judicial Officer (*Gilardi*, slip op. at 3, 42).

justification for not making full payment by the opening of the hearing.

Accordingly, the policy in future cases will be that if full payment is not made by the opening of the hearing, together with present compliance with the payment provisions of the Act and regulations (or if no hearing is to be held, by the time the answer is due), the case will be treated as a "no pay" case. There is, of course, no basis for considering as mitigating payments that are made by "robbing Peter to pay Paul," i.e., by "rolling over" the past-due accounts involved in the case, while continuing to violate the payment requirements. [28] (I cannot now conceive of extraordinary circumstances that would warrant further extending the time for making full payment and achieving compliance, but if any exist, they can be considered in a concrete factual setting.)

[28] To the extent that there is a bona fide dispute as to the amount due in a particular transaction, it should be excluded from consideration

It is further explained in *Gilardi* that it is important to the public interest that making a determination, as to whether full payment has been made and respondent is in present compliance with the payment provisions of the Act and regulations, should not delay the proceeding. The Judicial Officer stated that rather than incur such a delay, he would revoke the violator's license based on the proven slow-payment violations (slip op. at 45-49).

The record here shows quite clearly that respondent flagrantly and repeatedly violated the payment provisions of the Act and regulations, notwithstanding a prior warning letter, and that respondent was not in compliance with the payment provisions of the Act and regulations at the time of the hearing.

Although respondent's attorney tried to lead its president into testimony that he had express agreements with his suppliers for payments to be made beyond the 10-day period otherwise required by the regulations, the testimony of Edward Carpenito, respondent's president, shows quite clearly that he had no more than implied agreements for making delayed payment. Specifically, Mr. Carpenito testified (Tr. 118-21):

Q. All right.

Now, when you make your purchases, what do you discuss with the person who is selling to you?

A. Well, as I'm buying, sometimes they'll say, "Eddie, can you give me a check?" And I'll say, "Look, I'll try to give you a check this week if I possibly can." And they'll say, "All right." And then they'll give me the ticket and I'll just keep on going. And that's about it.

Q. Have you had that discussion with every supplier that supplies you with produce?

A. Very, very common. Yes, I do.

Q. And is it your understanding that they agree to this arrangement?

A. Yes, I do.

Q. And when that agreement is made, prior to this complaint, prior to '83 and '84 -- was there such an agreement in effect over the last --

A. As far as I can remember. As far back as I can remember when I started buying.

Q. All right.

And is it fair to say that this is just basically reconfirmed every so often or is that true?

A. It's just like a will. It just keeps going on and on and on.

Q. Now, have you ever not paid for produce?

A. I might have been late, but I've always paid for my produce.

Q. Now, with the suppliers that are listed in the complaint, have you had this agreement with each of these suppliers over the years?

A. Yes.

Q. And was this agreement expressed by you and expressed by them as you just testified?

A. Yes, it has been.

Q. Was this agreement in effect when these transactions in 1983 and '84 were entered into?

A. Yes.

Q. Now, can you remember any particulars -- can you remember times or places as to when these express agreements were entered into?

A. It happens every day of the week with me. I mean, from day one. I mean, you'd go up to buy. They say, "Eddie, can you give me a check?" And I tell them, "Yes, I'll give you a check as soon as I go back to the warehouse so I can cut a check. I'll cut a check for you if the funds are there." And they tell me, "Okay."

Q. And is that the point they give you the produce for the sale?

A. Yes.

Q. So these agreements as to payment are made before or at the time the transaction or sale is made. Is that correct?

A. 90 percent of the time. Sometimes they don't say nothing to me now. But 90 percent of the time, if they want money, they'll say, "Eddie, can you give me a check?" And I'll tell them.

Q. Now, the suppliers that are mentioned in the complaint and the transactions that are mentioned, you're familiar with those, are you not?

A. Yes, I am.

Q. And all those invoices that are listed there have been paid. Is that correct?

A. All of them have been paid 100 percent, yes.

Q. To the best of your knowledge, has anyone brought a reparation complaint against you for those amounts?

A. They all told me, no, they never did.

Q. And to the best of your knowledge, were they satisfied with the payment that you made to them?

A. Yes. They were happy they got it.

During the week before the hearing, Mr. Carpenito took a copy of a statement as to payment terms drafted by respondent's attorney and obtained signatures on the statement (exactly as prepared by respondent's attorney) from 20 of the 22 sellers involved in the present violations. The statement signed by the sellers is as follows (RX A):

STATEMENT AS TO PAYMENT TERMS

This is to clarify our agreement as to payment terms with Carpenito Bros., Inc. ATA 5 C's Fruit & Produce Co., Everett, Mass.

We have expressly agreed that payment would be made by 5 C's within a reasonable time with no set time limit. This agreement is in existence when each order is placed so we do not expressly state this agreement when each order is placed. This agreement was in effect during 1983 and 1984.

To date, all of 5 C's payments to us have been made in accord with our agreement as to payment.

We continue and will continue to provide 5 C's with produce.

One of the sellers, DiMare/New England Farms (Transaction Nos. 1–16), changed the language "with no set time limit" in the first sen-

tence of the second paragraph to "within 45 days" (RX A, p. 1). [5]

Another of the sellers, S. Strock & Co., Inc. (Transaction Nos. 484–92), rewrote the statement, as follows (RX A): To whom it may concern:

We had expressly agreed with Carpenito Bros., Inc. (5 C's Fruit & Produce Company) that our payment terms of 10 days were not applicable in the years prior to 1985.

5 C's Fruit has paid off their account in full.

The unsworn letters signed by respondent's suppliers have no probative value here. As stated in *In re Harry Klein Produce, Corp.*, 46 Agric. Dec. ____, slip op. at 54 (Feb. 6, 1987):

> These letters [from 17 of the 23 consignors and joint account partners] were prepared by respondent's attorney (Tr. 299–300), and were retyped by the principals on their letterheads.
>
> Most of them are verbatim, except for the opening paragraph setting forth how long they have been doing business with respondent. A few shippers shortened the letters or made minor changes. As stated with respect to similar unsworn statements relied upon by the respondent in *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2441 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984):
>
> These statements, being unsworn and presumably prepared by respondent's counsel, have no probative value here. *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746 (1982); and *see In re Ben Gatz Co.*, 38 Agric. Dec. 1038, 1044–45 (1979).

It should be noted that respondent has the burden of proving that it had express agreements as to the payment terms in effect at the time the original contracts of sale were made (*Gilardi*, slip op. at 5). The *unsworn statements* by the sellers go much farther in stating the existence of express agreements for payment to be made within a reasonable time with no set time limit than the *testimony* of Mr. Carpenito. Accordingly, the unsworn statements are not merely corroborative of any testimony in the record. When *complainant* attempted in a prior case to prove a major point entirely by hearsay, based on telephone conversations by James R. Frazier, then Senior Marketing Specialist in charge of complainant's disciplinary work, with various shippers, "Judge Baker discounted that testimony since respondent had no opportunity to cross-examine the individuals contacted by Mr. Frazier." *In re Hampshire Open Air-Mkt., Inc.*, 41 Agric. Dec. 955, 962 (1982). The Judicial Officer stated as to this matter (*id.* at 962–63):

[5] Respondent's attorney did not separately number the pages of his exhibit. The ALJ should require counsel in all cases to separately number each page of a multi-page exhibit. *In re Harry Klein Produce Corp.*, 46 Agric. Dec. ____, slip op. at 20–22 (Feb. 6, 1987).

> Although responsible hearsay is admissible in an administrative proceeding, its shortcomings are well recognized. Where other evidence is available, hearsay should not be relied on for a crucial finding of fact, except to corroborate other evidence.
>
> Complainant argues that it would impose an undue hardship on shippers to require them to testify since they are frequently at great distances from the hearing and, in many instances, the absence of a particular individual who conducts the bulk of the fruit and vegetable business for a firm would be highly detrimental. However, it would not be necessary for complainant to call all of the shippers involved. Two or three witnesses from firms handling a substantial number of transactions would be sufficient in most cases. And even if a few firms are inconvenienced, that is a necessary price that must be paid to attain the benefits of the regulatory program.

The unreliability of the unsworn statements relied on by respondent here is emphasized by the testimony of two of the sellers involved in respondent's violations. Mario Cutone, president of Mario Cutone Co. (Transaction Nos. 47–61), who signed one of the payment statements for respondent, testified that his company's payment terms were 21 to 30 days, which were related to everyone, including respondent, and that respondent did not pay in accordance with his credit terms. He signed the unsworn statement, which is directly contrary to his testimony, since he had known respondent a long time, had always been paid, and respondent promised that he would now pay within 28 days. Mr. Cutone testified (Tr. 141–46, 149–50):

> Q. Have you ever had a problem with Mr. Carpenito not paying you on time?
>
> A. Yes.
>
> Q. And what are the credit terms you extend to customers, if you have a general policy on that?
>
> A. We have a general policy of 21 to 30 days.
>
> Q. 21 to 30 days?
>
> A. Right.
>
> Q. And did you relate that or have you ever related that to Mr. Carpenito?
>
> A. Yes, I believe we relate it to everybody.
>
> Q. And what do you do if someone exceeds that time limit?
>
> A. We have the right to call them for a check, find out what the reason is, or do not sell them anything -- the company.
>
> Q. Have you ever had to do any of those things with Mr. Carpenito?

A. Yes.

Q. When was this approximately?

A. A year ago.

Q. About a year ago. In 1984?

A. Right.

Q. And how late was Mr. Carpenito in paying you?

A. It's hard to say. I don't have the records in front of me. I would say as much as -- are you talking about how fast he paid or when did I get all paid off?

Q. How fast did he pay?

A. I would say a couple of months, three months for a check. Right in that area.

Q. Would 12 months be unusual in some circumstances?

A. Oh, yes.

Q. It would be?

A. We have waited a year to get paid.

Q. Is that with Mr. Carpenito?

A. Right.

Q. And that would not be in accordance with your credit terms you previously stated?

A. No.

Q. Did you express that to Mr. Carpenito?

A. I called him and we asked for a check. And Mr. Carpenito did come over and give us a check when we called him. It was mostly just staying on top of it. We did get paid. We did start up a credit with him, I believe, about eight or nine months ago [i.e., about January or February 1985] with a buyer, I believe, that was buying for 5 "C's". They expressed their new terms. And we did go along with it.

And as of present date, the man has paid everything up to date. The only thing that I know -- that I checked -- that I believe he has on record, would be the last three weeks, which according to our business and our company, is fine at this present time.

Q. At the present time?

A. Right.

Q. Mr. Cutone, have you ever signed a statement as to payment terms for Mr. Carpenito?

A. I did.

Q. You did. Can you explain the circumstances surrounding your signing that?

A. At the time, I believe it was this week, I signed the paper -- let me put it this way. Can I express my opinion?

Q. Certainly.

A. Three reasons. Number one, I've known Mr. Carpenito for a long time. Number two, I've got paid in the past for everything that he's bought off me. I might have had to wait a year, but I got paid. And he expressed his opinion yesterday that -- and this is from Carpenito himself --

Q. Yes, sir, I understand.

A. -- that he would be no longer than 28 days on payment to me.

Q. And within that, I said, "Okay, we'll give it a whirl." You know, people will say, "Well, why do you go back when you got all your money?" Well, I mean, the man paid me. And when you come right down to it, maybe he didn't have to if he didn't want to.

Q. But when you signed that statement -- and I'm referring once again to Respondent's Exhibit A. Respondent's Exhibit A states, in part, that "We have expressly agreed that payment would be made by 5 "C's" within a reasonable time with no set time limit."

You've just testified to the fact that you had a set time limit on your payment terms.

A. We have a set time limit with everybody.

Q. All right.

And that would have been in effect?

A. Right.

Q. So this statement would be then inaccurate?

A. According to Eddie, the statement, the one I signed, that we would be paid within 4 weeks, which would be 28 days.

Q. Excuse me now? Could you repeat that?

A. Okay.

When I signed this the other day, Mr. Carpenito wanted to know if we would still extend him credit.

Q. Yes, sir.

A. And we said yes, okay, providing it was in our requirements. And he told me that it would be within 4 weeks, which would be 28 days, which we said was fine.

Q. So it was your understanding, when you signed this statement, that that was a statement that you would extend credit to him in the future?

A. I don't believe that statement, as I read that, included starting up now. I think this was in the past, okay? In the past -- let me put it this way. If a man owes you for 30 days, for an example, right?

Q. Yes, sir.

A. And he doesn't give you a check. Like I say, you have the right not to sell him or give him a call and find out why. Okay. There was a period of time, like he said, that we wouldn't sell him because of slow payment. It built up to where it shouldn't have been. But then, like I said, we did start up again with his new salesman and which everything seemed to work out fine.

Now, if we -- with some of the old money that was previous, okay? But as we went along, and as the man stayed in business, we kept receiving checks. And eventually we got paid up.

Q. But not always in accordance with your credit terms?

A. Not always in accordance with the rule, no -- with the rules that we had.

Q. And those were your payment terms? What were they?

A. 21 to 30 days.

. . . .

Q. Okay.

During the period March through December 1984 and --

A. '84, all right.

. . . .

Q. To your recollection, did you complain?

A. We did complain. We called him. I talked to his brother who was on the street, I believe, at the time, which was George. And I believe at the time we weren't selling him. But he was making payments periodically. I would ask him and they would bring over a check. In that period of time for whenever it may be -- I don't have the dates or figures in front of me -- he did pay everything that he owed.

Do you follow what I'm saying?

Q. Yes, sir. Did he pay everything he owed in accordance with your payment terms during that period of time?

A. No, no.

Similarly, Mr. Frank Forlizzi, president, Noyes and Bimber, Inc. (Transaction Nos. 81-120), testified that he or his brother, who signed

respondent's payment statement (RX A), called Mr. Carpenito a number of times during the preceding 5 years to remind him that their payment terms were 30 days. Mr. Carpenito always said that he would comply with the 30-day terms, but he still paid late. (Tr. 151-56).

Mr. Cutone and Mr. Forlizzi, whose testimony is discussed immediately above, account for 55 of the 523 violations involved in this case, or 10 ½%. This is consistent with the Judicial Officer's ruling in *In re Hampshire Open Air-Mkt., Inc.*, 41 Agric. Dec. 955, 962-63 (1982), that in order to avoid undue hardship to shippers, "it would not be necessary for complainant to call all of the shippers involved," but, rather, complainant should call 2 or 3 witnesses "from firms handling a substantial number of transactions. . . ." Complainant did that here.

On the other hand, respondent called none of the shippers as witnesses, even though respondent has the burden of proving that it had express agreements for delayed payment (*Gilardi*, slip op. at 5). In this respect, it should be noted that respondent does business in the Boston area, and all of the sellers to respondent are in the Boston area. Accordingly, the hearing in this case was originally set by the ALJ to be held at the Tax Court of the United States in Boston, Massachusetts (Order dated August 2, 1985). This is consistent with the Department's practice of holding hearings throughout the United States in locations that are convenient to the respondent and the respondent's witnesses. Although the record does not show why the hearing was rescheduled for Washington, D.C., which is the location of respondent's attorney, I am quite sure that the hearing would not have been rescheduled for Washington, D.C., unless respondent's attorney requested the change, or at least agreed to the change.

In any event, however, the probative evidence here shows no more than *implied* agreements between respondent and most of its sellers to pay within a reasonable time, and respondent failed to comply even with those implied agreements.

If it were necessary to determine what is a "reasonable time," with respect to the 1983 and 1984 violations involved in this proceeding (i.e., if respondent had *express* agreements for payment to be made within a reasonable time), I would hold that any payment beyond 45 days (or at least beyond 60 days) was not made within a "reasonable time." In this respect, the ALJ expressly found that respondent did not always pay its suppliers within the expected time, and respondent filed no appeal or cross-appeal from the ALJ's findings. [8] Specifically, the ALJ found (Initial Decision at 10-11):

> 15. Thus, there is undisputed evidence that there were implied agreements, premised upon past payment practices, existing with the suppliers and the Respondent. However, such payment agreements were not always adhered to by the Respondent, although he always paid everyone he owed, although it be late. Respondent admitted that some suppliers stopped selling to him because "* * * I wasn't paying them fast enough" (Tr. 131), and that Respondent had received complaints from some of the sellers listed in the Complaint about not receiving payments on time (Tr. 131, 134).
>
> 16. Both by Complainant's evidence and Mr. Carpenito's testimony, it is evident that Respondent did not always pay his suppliers within the time expected and agreed to by the Respondent and the suppliers. Such payment practices are a violation of section 2 of the PACA (7 U.S.C. 499b).

In this case, however, there is no need to determine what a "reasonable" time period would have been for making payment in the transactions involved here because respondent was bound by the 10-day rule provided for in the regulations, in the absence of *express* agreements for delayed payment (*Gilardi*, slip op. at 3-6).

A brief digression is appropriate to discuss what is a "reasonable" payment period where there is a written agreement made after December 20, 1984 (the effective date of new regulations), for payment to be made within a "reasonable" period. In 1984, Congress enacted statutory trust provisions under the Perishable Agricultural Commodities Act (7 U.S.C. § 499e(c)(1)-(4) (Supp. II 1984)) similar to those enacted in 1976 under the Packers and Stockyards Act (7 U.S.C. § 196(b)-(c)). In connection with the statutory trust provisions, Congress required the Secretary to define a "reasonable" credit period. The congressional report as to the statutory trust legislation states (H.R. Rep. No. 543, 98th Cong., 1st Sess. 6-7 (1983)):

> The Committee finds that it is common practice in the produce business to extend credit for reasonable periods of time

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[8] Under this Department's rules of practice, an appeal can be filed by a party who agrees with the result of the case, but not with all of the findings or conclusions by the ALJ. *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1132 (1981).

> beyond the time prescribed for "cash" transactions in regulations issued by the Secretary under the provisions of the Packers and Stockyards Act. Consequently, to be effective, the trust applies to credit transactions as well as to the straight cash transactions. However, the Committee does not intend the trust to apply to any credit transaction that extends beyond a reasonable period. Under the bill the Secretary is required to establish, through rulemaking, the time by which, the parties to a transaction must agree payment on a transaction must be made, to qualify it for coverage under the trust. An agreement for payment after such time will not be eligible to receive the benefits of the trust.

In accordance with the congressional mandate, the Secretary established 30 days as the "reasonable" time period for credit transactions. Specifically, the Secretary's trust regulations, effective December 20, 1984, provide (7 C.F.R. § 46.46(f)):

> (f) *Prompt payment and eligibility for trust benefits.* (1) The times for prompt accounting and prompt payment are set out in § 46.2(z) and (aa). Parties who elect to use different times for payment must reduce their agreement to writing before entering into the transaction and maintain a copy of their agreement in their records, and the times of payment must be disclosed on invoices, accountings, and other documents relating to the transaction.
>
> (2) The maximum time for payment for a shipment to which a seller, supplier, or agent can agree and still qualify for coverage under the trust is 30 days after receipt and acceptance of the commodities as defined in § 46.2(dd) and paragraph (b)(1) of this section.

Accordingly, if parties enter into a written agreement for payment to be made within a "reasonable" time period, after the enactment of the Secretary's trust regulations, and there are no other provisions shedding light on the meaning to be attributed to the term "reasonable," I will regard the agreement to provide for payment within 30 days. In the case of the agreements signed by most of respondent's sellers in October 1985 (RX A), however, the agreements state that respondent's payments have been made "in accord" with their agreement as to payment within a "reasonable" time. This shows that the sellers interpret the word "reasonable" (at least after October 11–15, 1985) to include a much longer period than 30 days.. Accordingly, it would seem that respondent's sellers have (unknowingly, I am sure) eliminated themselves from the benefits of the statutory trust provisions. (For our purposes here, the agreements entered into in October 1985 are of no consequence as to previous violations.)

Under the holding in *Gilardi*, respondent's license should be revoked for the 523 violations involved here, unless by the time of the hearing, respondent had made full payment and was in present compli-

ance with the payment provisions of the Act and regulations (*Gilardi*, slip op. at 42–49). Respondent barely met the deadline of paying all of the sellers in full just before the hearing (Tr. 67). However, respondent's license should still be revoked because respondent was continuing to violate the payment provisions of the regulations during the period from April 29, 1985, to October 13, 1985, 4 days prior to the hearing held on October 17, 1985.

In accordance with the holding in *Gilardi*, slip op. at 43–44, quoted at the outset of the conclusions, complainant's investigator, Ms. Myrna Sterin, went to respondent's place of business on October 15, 1985, 2 days prior to the hearing, and asked for respondent's unpaid invoices. (Tr. 22, 45–55). She found 143 violations totaling $72,380.70, in which respondent should have made payment up to 5| months earlier (CX 2–4).

The ALJ erroneously excluded the evidence relating to respondent's 143 current violations, relying on *In re Hampshire Open Air–Mkt., Inc.*, 41 Agric. Dec. 955, 963 (1982), which held:

> During the course of the hearing, complainant sought to introduce evidence relating to transactions not alleged in the complaint. The evidence was not offered to expand the number of violations involved in the case but, rather, to explain the basis for complainant's recommendations as to the sanction. However, evidence as to violations not alleged in the complaint (and not set forth in a prior decision) has no relevancy for any purpose in an administrative proceeding. If the evidence is of sufficient importance, complainant should request that the complaint be amended, with adequate opportunity afforded to respondent to meet the new allegations. But if the complaint is not amended, evidence as to such other violations is not admissible to explain complainant's recommendation as to the sanction, or for any other purpose.

The ALJ's reliance on *Hampshire Open Air–Mkt.* is misplaced for two reasons. In the first place, the *Hampshire* case is superseded by the new policy subsequently announced in *Gilardi*. Under *Gilardi* (slip op. at 44), evidence of "present compliance with the payment provisions of the Act and regulations" is required if a revocation order that would otherwise be imposed for the specific violations involved in the case is to be reduced to a suspension order. In fact, *Gilardi* does not even say who has the burden of proving respondent's "present" compliance or noncompliance with the payment provisions of the Act and regulations. (At least for the time being, I will leave the burden of proving noncompliance on complainant.) In any event, however, any respondent seeking the benefit of a suspension order rather than a revocation order, under *Gilardi*, is necessarily placed on notice that respondent's present compliance with the payment provisions of the Act and regulations is a matter at issue in the proceeding. (Respondent's attorney was familiar with the *Gilardi* decision (Tr. 57–58)).

In the second place, the complaint in this case, unlike the complaint in *Hampshire*, expressly placed in issue respondent's noncompliance with the payment provisions subsequent to the specific transactions alleged in the complaint. Specifically, the complaint alleges (Complaint at 17):

> 7. Further, on information and belief, Respondent has engaged in, is engaging in, and will continue to engage in, a course of conduct which involves failure to make full payment promptly for perishable agricultural commodities, received and accepted by it in interstate and foreign commerce, in violation of Section 2(4) of the PACA (7 U.S.C. 499b(4)). [7]

Accordingly, the ALJ erroneously excluded complainant's evidence as to respondent's noncompliance with the payment provisions during the months immediately prior to the hearing. Complainant made an appropriate offer of proof (Tr. 51-54) in accordance with the Department's rules of practice, which provide (7 C.F.R. § 1.141(g)(7)):

> (7) *Offer of Proof.* Whenever evidence is excluded by the Judge, the party offering such evidence may make an offer of proof, which shall be included in the transcript. The offer of proof shall consist of a brief statement describing the evidence excluded. If the evidence consists of a brief oral statement, it shall be included in the transcript in toto. If the evidence consists of an exhibit, it shall be marked for identification and inserted in the hearing record. In either event, the evidence shall be considered a part of the transcript and hearing record if the Judicial Officer, upon appeal, decides the Judge's ruling excluding the evidence was erroneous and prejudicial. If the Judicial Officer decides the Judge's ruling excluding the evidence was erroneous and prejudicial and that it would be inappropriate to have such evidence considered a part of the hearing record, the Judicial Officer may direct that the hearing be

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[7] In these circumstances, there is no basis for the ALJ's view that it would have been patently unfair to require respondent to defend complainant's proffered evidence as to the 143 current violations (Initial Decision at 15-16). However, if a reviewing court should disagree, it would not aid respondent. If complainant's methodology here, approved by the Judicial Officer, were to be held unlawful, I would change the Department's sanction policy and not give respondents the opportunity to obtain a license suspension, rather than a license revocation, where there have been flagrant and repeated slow-payment violations such as those involved here. Although that would be a more severe sanction policy than that previously followed, it is the long-standing practice of this Department to change the sanction policy, where appropriate, in the pending case, rather than merely to announce that a more severe sanction policy will be followed in future cases. *In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. ____, slip op. at 233-34 (Mar. 19, 1987); *In re Worsley*, 33 Agric. Dec. 1547, 1569-70 (1974).

re-opened to permit the taking of such evidence or for any other purpose in connection with the excluded evidence.

Under the Department's rules of practice, I am considering complainant's offer of proof as to respondent's noncompliance during the months immediately prior to the hearing as evidence in this proceeding. [8] As stated in *Southern Nat. Mfg. Co., Inc. v. EPA*, 470 F.2d 194, 200 (8th Cir. 1972), "[t]hese provisions for agency review gave adequate advance warning to petitioners that excluded unfavorable evidence might later be admitted *to their detriment*." Moreover, respondent's attorney was expressly advised that if the Judicial Officer should reverse the ALJ's evidentiary ruling excluding complainant's evidence, he might receive it as evidence without a remand for further proceedings (Tr. 56).

Furthermore, respondent's testimony demonstrates that he has no significant defense to the 143 violations included in complainant's offer of proof. In the first place, in order for the benefits of *Gilardi* to be available to respondent, the evidence would have to show that respondent was in compliance with the payment provisions as to all (or all but a *de minimis* number) of the 143 transactions included in complainant's offer of proof (CX 2-4). This would, as a practical matter, be *impossible* inasmuch as it was Mr. Carpenito who gave complainant's investigator the invoices which he said were unpaid (Tr. 48-49, 51-54). At best, respondent might have been able to prove that a few of the transactions actually had been paid at that time, or that there were adjustments due on some of the transactions. That evidence would have been insignificant.

Of greatest importance is the fact that respondent admits that at the time the 143 transactions were entered into, he had no *written* agreements with his sellers as to delayed-payment terms. Mr. Carpenito testified (Tr. 133):

> Q. Okay.
>
> Have you ever entered into written credit agreements with any of these people?
>
> A. No, nothing other than this [RX A].

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[8] *In re Thornton*, 38 Agric. Dec. 1425, 1433 (remand order), *final decision*, 38 Agric. Dec. 1539 (1979); *In re Corona Livestock Auction, Inc.*, 36 Agric. Dec. 1169, 1171 n.2 (1976) (remand order), *final decision*, 36 Agric. Dec. 1285 (1977), *rev'd on other grounds*, 607 F.2d 811 (9th Cir. 1979); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 & n.5 (1976) (fairness to respondents did not require a remand since "respondents' unwarranted objections resulted in the erroneous exclusion of the evidence," and the regulations and complainant's attorney informed respondents that the excluded evidence might later be admitted to their detriment, *id.* n.5), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).

A. Than this statement I've gotten from each one of them [RX A].

Effective December 20, 1984, the regulations were amended to require *written* agreements for delayed payment. The amended regulation, which was in effect during all of the 1985 violations included in complainant's offer of proof, states (49 Fed. Reg. 45,735, 45,740 (1984), codified at 7 C.F.R. § 46.2(aa)(11)):

> (11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly", *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

The written agreements referred to by Mr. Carpenito were signed between October 11 and 15, 1985, which was subsequent to respondent's acceptance of all of the 143 lots of produce involved in complainant's offer of proof. Since respondent admits that there were no *written* agreements for delayed payment when it accepted the 143 lots of produce involved in complainant's offer of proof, respondent was bound by the 10-day payment rule, and there is no possible evidence that respondent could have adduced to disapprove all (or all except a *de minimis* number) of the 143 current violations.

The existence of implied agreements (or even oral, express agreements) for delayed payment relating to the 143 current violations would not affect the sanction in any manner. That is, the sanction of revocation is being imposed for the 523 violations specifically alleged in the complaint--not for the 143 current violations. Accordingly, we are not concerned with whether there are any mitigating circumstances (such as implied agreements) as to the 143 current violations. [9] Under *Gilardi*, respondent must be in *compliance* with the payment provisions immediately prior to the hearing in order to avoid a revocation order based on its past violations. Being almost in compliance is not enough! And showing mitigating circumstances as to why respondent was not in compliance is not enough! Under *Gilardi*, revocation will be ordered for

[9] If respondent had been in compliance with the payment provisions of the Act and regulations during the period covered by complainant's offer of proof, the existence of the implied agreements as to the 523 violations in 1983 and 1984 would have been a mitigating circumstance reducing the sanction from 90 days to 70 days. *In re Hampshire Open Air-Mkt., Inc.*, 41 Agric. Dec. 955, 961 n.2 (1982); *In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1117-22 (1978).

the past violations unless respondent is in compliance with the payment provisions immediately before the hearing.

The ALJ criticizes complainant's offer of proof on the basis that it does not contain balance sheets, profit and loss statements, or a cash flow analysis. She states (Initial Decision at 12, 16):

> Such offer of proof does *not* consist of balance sheets, profit and loss statements, or cash flow analysis.
>
> . . . .
>
> . . . A mere audit of current unpaid invoices, without more, such as cash flow statements, reconciliation statements, balance sheets, and profit and loss statements, would not sustain a determination as to a Respondent's current financial condition. Also, at the time of the pre-hearing audit, the Respondent had express written agreements. [10] Even if Complainant's offer of proof had been received into evidence, the invoices, not paid within ten days, do not furnish proof that the Respondent was then currently in violation of the Act.

If complainant had attempted to introduce respondent's balance sheets, profit and loss statements, or a cash flow analysis, such evidence should have been excluded as irrelevant. You do not determine whether a licensee is complying with the payment provisions of the Act and regulations by looking at balance sheets, profit and loss statements, or a cash flow analysis. After the effective date of the amendment requiring written agreements for delayed payment (December 20, 1984), you determine compliance with the payment provisions solely by seeing whether payment was made "within 10 days after the day on which the produce [was] accepted" (7 C.F.R. § 46.2(aa)(5)), where, as here, there were admittedly no *written* agreements for delayed payment in existence when the produce was accepted.

The ALJ failed to distinguish between the "window dressing" in *Gilardi* and the square holding in *Gilardi*. The "window dressing" talks of "robbing Peter to pay Paul" and "rolling over" past-due accounts (*Gilardi*, slip op. at 44). The square holding is that "if full payment is not made by the opening of the hearing, together with present compliance with the payment provisions of the Act and regulations (or if no hearing is to be held, by the time the answer is due), the case will be treated as a 'no pay' case" (*ibid.*).

One final word should be said as to a change in the *Gilardi* policy that I am making in view of the wisdom derived from this case. Although there is no evidence here that Mr. Carpenito obtained the pay

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[10] The express written agreements would only be relevant as to produce accepted by respondent after they were signed. As shown above, all of the produce in the 143 violations under discussion was accepted by respondent before the written agreements were signed.

ment statements relied on by respondent (RX A) by using undue influence, I can easily foresee the possibility in a future case that a respondent heavily indebted to suppliers could exact written agreements from them authorizing lengthy payment delays by telling the suppliers that unless they sign such agreements, the respondent's license would undoubtedly be revoked by the Department, and the suppliers would be left "holding the bag" as to the existing indebtedness.

Accordingly, in future cases involving repeated and flagrant slow-payment violations, where a respondent would like to obtain a license suspension order rather than a license-revocation order, in addition to requiring that full payment must be made by the opening of the hearing, together with present compliance with the payment provisions of the Act and regulations, I will require that respondent's present compliance not involve credit agreements for more than 30 days. This is necessary to prevent respondents in danger of having their licenses revoked from using undue influence in order to obtain written agreements for lengthy credit terms, and to prevent the suppliers from either unknowingly giving up the benefit of their trust protection, or knowingly giving up the benefit of their trust protection as the lesser of the evils.

For the foregoing reasons, the following order should be issued. [11]

Order

Respondent's license is revoked.

The facts and circumstances as set forth herein shall be published. This order shall take effect on the 30th day after service thereof on the respondent.

In re: FRANK W. DELEGAL, JR., a/t/a DELEGAL CORP. PACA Docket No. 2-7202. Decision and order filed February 17, 1987.

Failure to pay promptly—Willful, repeated and flagrant violations—Publication of the facts—Default.

Andrew Stanton, for complainant.

William F. Beggs, Ft. Lauderdale, Florida for respondent.

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[11] This is one of a group of cases that has been unreasonably delayed in the Office of the Judicial Officer. During 1985 and 1986, the workload of the Judicial Officer doubled. Because of budgetary constraints, an assistant was not obtained until November 2, 1986.

A number of matters discussed by the parties and the ALJ have been fully considered, but are not discussed herein because they are of no substantial consequence.

Decision issued by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on June 12, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period November 1985 through December 1985, respondent purchased, received, and accepted, in interstate and foreign commerce, from 18 sellers, 194 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $597,563.80. A copy of the complaint was served upon respondent, who filed an answer but withdrew the answer on October 6, 1986. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. 1.139). [1]

Findings Of Fact

1. Respondent,Frank W. Delegal, Jr., a/t/a Delegal Corp., is an individual, whose address is State Farmers Market, Stall 38, 1200 Hammondville Road, Pompano Beach, Florida 33060.

2. Pursuant to the licensing provisions of the Act, license number 691304 was issued to respondent on January 28, 1969. This license was renewed annually, but terminated on January 28, 1986, pursuant to Section 4(a) of the Act (7 U.S.C. 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period November 1985 through December 1985, respondent purchased, received, and accepted in interstate and foreign commerce, from 18 sellers, 194 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $597,563.80.

Conclusions

Respondent's failure to make full payment promptly with respect to the 194 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

Order

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[1] Respondent's objection to Proposed Decision and Order has been considered and found to be without merit for the reasons stated by complainant.

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This decision and order became final March 30, 1987.—Editor.]

In re: Harry Klein Produce Corp. PACA Docket No. 2-6992 Order filed March 9, 1987.

Edward Silverstein, for complainant.

Stephen P. McCarron, Silver Spring, Maryland, for respondent.

Order issued by Donald A. Campbell, Judicial Officer.

STAY ORDER

The order previously issued in this case is hereby stayed pending the outcome of proceedings for judicial review.

In re: QUALI-FRESH MARKETING, INC. PACA Docket No. 2-7174. Decision and Order filed January 7, 1987.

Failure to pay promptly—Willful, repeated and flagrant violations—Publication of the facts—Default.

Edward M. Silverstein, for complainant.

Respondent, *Pro Se.*

Decision issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a et seq.) hereinafter referred to as the "Act", instituted by a complaint filed on May 6, 1986, by the Director, Fruit and Vegetable Division, Agricultural Mar-

keting Service, United States Department of Agriculture. It is alleged in the complaint that during the period August 1985 through December 1985, respondent purchased, received, and accepted, in interstate and foreign commerce, from 25 sellers, 112 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $109,825.49. It also is alleged that, during the period October through December 1985, respondent purchased, received and accepted, in interstate commerce, from 15 sellers, 68 lots of fruits and vegetables, all being perishable agricultural commodities for which it failed to make full payment promptly but that, subsequent to these sellers having perfected their trust interests under section 5 of the Act (7 U.S.C.§ 499e) and filed court proceedings, respondent was ordered to and did make full, albeit not prompt, payment to them.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. 1.139).

Findings of Fact

1. Respondent, Quali-Fresh Marketing, Inc., is a corporation, whose address is 570 Pine Street, St. Paul, Minnesota 55101.

2. Pursuant to the licensing provisions of the Act, license number 850556 was issued to respondent on January 29, 1985. This license terminated on January 29, 1986, pursuant to Section 4(a) of the Act (7 U.S.C. 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period August 1985 through December 1985, respondent purchased, received, and accepted in interstate commerce, from 25 sellers, 112 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $109,825.49.

4. As more fully set forth in paragraph 6 of the complaint, during the period October through December 1985, respondent failed to make full payment promptly to 15 sellers of the agreed purchase prices, or balances thereof, in the total amount of $173,996.30 for 68 lots of fruits and vegetables, all being perishable agricultural commodities, which it purchased, received and accepted in interstate commerce. Subsequent to these failures to make prompt payment, the 15 sellers filed timely notices with the Secretary and with respondent of their intent to protect their trust benefits under section 5 of the PACA (7 U.S.C. 499e). On December 13, 1985, respondent filed a Voluntary Petition pursuant to Chapter 11 of the Bankruptcy Court for the District of Minnesota,

which was designated as Case No. 3-85-3067. After proceedings held before the bankruptcy court, respondent was orderedto make payment to the 15 sellers as trust beneficiaries. Thereafter, payment for the 68 transactions noted above was made to the 15 sellers as trust beneficiaries from trust assets during the last week of March 1986.

Conclusions

Respondent's failure to make full payment promptly with respect to the 180 transactions set forth in Findings of Fact No. 3, and 4, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final. Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

[This decision and order became final March 17, 1987.—Editor.]

Copies hereof shall be served upon parties.

THOMAS F. BRAMAN *v.* B. G. MARKETING COMPANY. PACA Docket No. 2-7262. Decision and order filed March 13, 1987.

Assignment for benefit of creditors—Failure to pay.

Where complaint alleging failure to pay for produce contains invoices and bills of lading showing respondent received the produce, complainant has established a prima facie case and is entitled to reparation award where respondent's only defense is that it made an assignment of assets for the benefit of creditors under state law. Such assignments do not bar the reparations proceeding.

Peter V. Train, Presiding Officer.

Complainant, *pro se.*

Roger Schlossberg, Hagerstown, Maryland, for respondent.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought award of reparation in the amount of $4,680.00 in connection with the sale of apples in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent. On August 5, 1986, respondent's assignee filed what it styled "Answer to Complaint and Suggestion of Insolvency" in which the assignee asserted that respondent made a general assignment of all its assets to him and that he had no particular knowledge of the facts alleged in the complaint and therefore could neither admit nor deny the allegations of the complaint. The assignee also moved that this reparation proceeding be stayed pending a final accounting and distribution of respondent's assets. Respondent's motion was denied on August 28, 1986, on the basis that there is no provision in Maryland state law or federal law requiring that federal administrative proceedings be stayed because of the filing of an assignment for the benefit of creditors.

Since the amount claimed in damages does not exceed $15,000.00, the shortened procedure provided in Section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) applies. Under this procedure, the verified complaint of the complainant as well as the Department's report of investigation are part of the evidence in the case. Respondent's answer, because it was unverified, is not part of the evidence. Additionally, both parties were given the opportunity to file evidence in form of verified statements. Complainant filed an opening statement; respondent did not. Neither party filed a brief.

Findings of Fact

1. Complainant Thomas F. Braman is an individual doing business as Braman Fruit Company whose business address is P. O. Box 1377, Grand Rapids, Michigan 49501.

2. Respondent B.G. Marketing Company is a corporation whose address is P. O. Box 649, Hagerstown, Maryland 21741 At the time of the transactions involved herein, respondent was licensed under the Act.

3. On March 1, 1986, complainant sold apples in interstate commerce to respondent in the amount of $3,180.00.

4. On March 8, 1986, complainant sold apples in interstate commerce to respondent in the amount of $1,500.00.

5. Respondent received and accepted the produce, but has paid nothing with respect to any of the transactions.

6. The complaint was filed on April 18, 1986, which was within nine months of the time the causes of action herein arose.

Conclusions

Complainant has made a prima facie showing in this case that it shipped the apples in question at a total invoice price of $4,680.00. (Complainant's Exhibits 1 and 2 to the complaint) Respondent's only defense was that it filed an assignment for the benefit of creditors under Maryland law.

Such assignments, however, do not provide a defense in reparation proceedings. *Arbittier Farms v. Top Banana Farmers Market, Inc.*, 42 Agric. Dec. 1272 (1983); *Fruit Salad, Inc. v. M. Egan Co., Inc.*, 42 Agric. Dec. 664 (1983). They do not cut off the rights of parties to proceed before the Secretary in reparation proceedings. Furthermore, a reparation order has effects not attendant to any other proceeding. For example, failure to pay a reparation award results in sanctions against licensees, and those individuals responsibly connected with corporate licensees. *See*, 7 U.S.C. §§ 499g, h.

There is no indication in the record that respondent did other than accept the shipments of apples in interstate commerce. Nor is there any evidence that there has been any payment to complainant by respondent or respondent's assignee. Respondent is therefore liable to complainant for the full purchase price of the apples, or $4,680.00. The failure of respondent to pay this amount to complainant is a violation of section 2 of the Act for which reparation should be awarded to the complainant with interest.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $4,680.00, with interest thereon at the rate of 13 percent per annum from April 1, 1986, until paid.

Copies hereof shall be served upon the parties.

RICHARD S. BROWN, INC., *v.* POST & TABACK, INC. PACA Docket No. 2-7080. Order filed March 13, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on November 24, 1986, awarding complainant reparation in the amount of $385.50 plus interest. On December 24, 1986, complainant sought reconsideration of this Decision and Order, and on January 27, 1987, the Decision and Order was stayed pending reconsideration. A copy of complainant's petition was served upon respondent which filed a response in opposition thereto.

Complainant's petition for reconsideration focuses on the method used for valuing the subject shipment of lettuce. It submits that, for setting a value on the lettuce had it met contract requirements, we should have referred to the Market News price rather than using the delivered price, *i.e.*, contract price plus freight. Complainant is correct. *See United Fruit Sales* v. *Yeckes-Eichenbaum*, 29 Agric. Dec. 1408 (1970).

The respondent's damages should have been computed as follows: [1] The value of the lettuce had it met the contract's requirements, which is the Market News price ($5.50 x 410 or $2,255.00), less the value of the lettuce actually received, which is the total of the gross proceeds received on resale of the lettuce ($2,135.00). The respondent's damages, therefore, were $120.00. In addition, respondent incurred reimbursable costs attributable to the resale of the lettuce, *i.e.*, expenses for terminal charges, unloading and a reasonable commission. The total damages suffered by respondent, therefore, are $465.20. Respondent's total damages subtracted from the parties' agreed contract price ($2,135.00) leaves a balance due complainant of $1,669.80. As respondent has already paid complainant $349.00, the balance remaining due complainant from respondent is $1,320.80. Respondent's failure to pay complainant this amount is a violation of the Act for which reparation plus interest should be awarded.

In view of the above, the November 24, 1986, Order is set aside and the following shall substitute therefor.

Order

[1] *Corte & Sons* v. *Lerner & Son*, 14 Agric. Dec. 320 (1955).

The January 27, 1987, Stay Order is vacated.

Within thirty days from the date of this order, respondent shall pay complainant $1,320.80 as reparation, plus interest at the rate of 13% per annum from May 1, 1985, until paid.

Copies of this Order shall be served upon the parties.

CAL-MEX DISTRIBUTORS, INC. *v.* FOUR C'S PACKING COMPANY. PACA Docket No. 2-7002. Order filed March 9, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER DISMISSING PETITION FOR RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on December 17, 1986, awarding reparation to complainant in the amount of $596.00 plus interest. An Order Requiring Payment of Undisputed Amount had earlier been issued, on January 17, 1986, awarding complainant $2,001.50, plus interest, based on respondent's admission of liability in its answer.

Respondent filed a petition for reconsideration on January 22, 1987, eight days after it was mailed, by regular mail, from Chula Vista, California. The Decision and Order specifically states that respondent shall pay the reparation awarded to complainant "[w]ithin thirty days from the date of this order . . . ." In accordance with section 10 of the Act (7 U.S.C. § 499j), the Decision and Order became final at the expiration of this 30 day period on January 17, 1987, five days prior to the filing of the petition for reconsideration. The law is clear that an administrative agency has no jurisdiction to reconsider a decision after the decision has, in accordance with the applicable statute, become final due to the expiration of the time allowed for filing a petition for review. *Lasky v. Commissioner of Internal Revenue*, 235 F.2d 97 (9th Cir. 1956), *aff'd per curiam*, 352 U.S. 1027 (1956); *Santo Tomas Produce Association v. Elizar Ozuna, et al*, 39 Agric. Dec. 795 (1980). Therefore, the Secretary is without jurisdiction to reconsider respondent's petition, and it is hereby dismissed.

Copies of this order shall be served upon the parties.

FIVE STAR PRODUCE, INC. *v.* EAGLES THREE, INC. a/t/a TRADEMARK PRODUCE & SALES. PACA Docket No. 2-7049. Decision and order filed March 12, 1987.

Burden of proof, complainant—Broker's duties.

Where complainant fails to prove respondent agreed to purchase potatoes and also failed that respondent violated its duties as a broker, complaint is dismissed.

Edward M. Silverstein, Presiding Officer.

Stephen P. McCarron, Silver Spring, Maryland, for complainant.

Craig M. Liebler, Kennewich, Washington, for respondent.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.). A timely complaint was filed in which complainant seeks $14,042.00 from respondent in connection with two transactions in interstate commerce involving potatoes, a perishable agricultural commodity.

Both parties were served with a copy of the Department's report of investigation. Respondent also was served with a copy of the formal complaint and filed an answer thereto in which it denied any liability to complainant. After receiving leave to do so, complainant filed an amended complaint. Respondent filed an answer to the amended complaint in which it again denied that it had any liability to complainant.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the rules of practice (7 C.F.R. § 47.20) was followed. Pursuant to this procedure the verified pleadings o f the parties are considered part of the evidence of the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file further evidence by way of verified statements, however, neither party did so. Complainant filed a brief.

Findings of Fact

1. Complainant, Five Star Produce, Inc., is a corporation whose address is 2511 East Road 6 North, Monte Vista, California 81144.

2. Respondent, Eagles Three, Inc., is a corporation a/t/a Trademark Produce & Sales whose address is 6201 W. Clearwater, Suite F, Kennewick, Washington 99336. At all material times, respondent was licensed under the Act.

3. On October 5 and 11, 1984, in the course of interstate commerce, through respondent acting as a broker, complainant sold two lots of potatoes to Provigo Distribution, Inc., Montreal, Canada ("Provigo"), for shipment to the buyer's agent on the Hunt's Point Market in New York City, New York. The first load consisted of 1300 100# bags of Elkhead brand potatoes sold at a delivered price of $5.2815 per cwt., or a total of $6,866.00. The details of the second load are as follows:

Quantity	Lot Size	Brand	Price CWT.	Total
126	100#	Hi-Altitude	$5.00	$ 630.00
532	50#	Elkhead	8.00	2128.00
818	100#	Diamond	5.00	4090.00
82	100#	Big Horn	4.00	328.00

The total agreed contract price on this lot, which was sold f.o.b., was $7,176.00

4. On October 5, 1984, and October 11, 1984, the respondent issued proper brokers memoranda of sale and sent those copies to complainant and Provigo. The brokers memoranda sent to complainant were received by it. Complainant did not make a protest to respondent as to the terms of sale set out in those memoranda.

5. On or about October 9, 1984, and October 16, 1984, complainant shipped the potatoes to Provigo in New York. At the same time it invoiced respondent for them. Upon receipt of the invoices, respondent informed complainant that, as it was not the purchaser of the potatoes, it was mistakenly invoiced.

6. On or about October 10, 1984, and October 18, 1984, respondent, on behalf of complainant, invoiced Provigo for the potatoes. Although it has made numerous attempts to do so, respondent has not been able to gain payment for the potatoes for Provigo.

7. On October 30, 1984, after the Provigo's New York agent had complained about the arrival condition of the potatoes shipped on October 16, 1984, complainant agreed to grant the buyer a $1.00 per cwt. allowance. This reduce d the agreed f.o.b. price for the potatoes by $1,292.00, or from $7,176.00 to $5,884.00. On that same date, respondent sent the complainant and Provigo a "Notice of Complaint" detailing the complainant's agreement with regard to the allowance.

8. Provigo and its New York agent are embroiled in a dispute regarding shipments of bananas. As a result of this dispute, neither of them is willing to pay for the potatoes involved in this proceeding.

9. On October 4, 1985, respondent "assigned whatever interest it had in the two subject loads of potatoes to complainant.

10. The informal complaint was filed on July 26, 1985, which was within nine months after the cause of action herein accrued.

Conclusions

The dispositive issue in this proceeding concerns whether the respondent purchased the two lots of potatoes from complainant or whether it merely acted as a broker between the complainant and the buyer. As the moving party, the complainant has the burden of proving its allegation that it had a contractual relationship with the respondent as the buyer of the potatoes. *Great Lakes Packing Co.* v. *Santa Fe Berry Packers*, 16 Agric. Dec. 818 (1957). In this it has failed. The only probative evidence in the record supporting complainant's allegation

are the invoices on which it named respondent as the purchaser of the potatoes as well as the broker for the transaction. Respondent's evidence consists of its verified answer in which it is indicated that a protest was made to complainant regarding the latter's invoice, respondent's copies of the complainant's invoices indicating that such a protest had been made, the two brokers memoranda of sale it issued, and the notice of complaint which it also issued. Apparently, complainant received all of the documents issued by respondent without complaint. In view of this record, we hold that the preponderance of the evidence in the record indicates that respondent did not purchase the two subject lots of potatoes, that the role it played in the subject transactions was as a broker between complainant and Provigo, who did purchase the potatoes, and that Provigo has failed to pay for its purchase.

In its amended complaint, complainant further alleges that, if respondent was not held to be the purchaser of the potatoes but is held to have acted as the broker for the transactions, then it failed to carry out its duties as such. As to this issue also, complainant has the burden of proof. *H. B. Frost Co. v. J. E. Nelson & Sons*, 10 Agric. Dec. 378 (1951). However, it has offered no proof on this matter whatsoever. The main thrust of complainant's argument on this point is that, since it billed respondent incorrectly, it is "clear" that respondent did not properly inform it as to the purchaser of the potatoes. However, in making this argument, complainant fails to consider that the respondent, in the brokers memoranda it issued, did properly inform it as to the name of the purchaser of the potatoes. Moreover, there is no evidence in the record which supports complainant's allegation that it was misinformed as to the name of the purchaser. We must hold, therefore, that complainant has failed to sustain its burden of proof on this point.

The record as a whole establishes that respondent was the broker involved in these two transactions, that it did agree to collect and remit, but that it has not been able to do so through no fault of its own. Accordingly, t he complaint should be dismissed.

Order

The complaint is dismissed.

Copies of this order shall be served upon the parties.

FRANCIS PRODUCE CO., INC. *v.* TOMATO OF VIRGINIA. PACA Docket No. 2-6915. Decision and Order filed March 12, 1987.

Failure to reject produce constitutes acceptance—Official notice taken of license records.

Agent of respondent contracted for cantaloupes which were delivered. Respondent failed to pay for them. Judgement for complainant.

FRANCIS PRODUCE CO., INC. v. TOMATO OF VIRGINIA

Allan R. Kahan, Presiding Officer

Complainant, *pro se*.

Respondent, *pro se*.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in connection with the sale of 1064 crates of cantaloupes in interstate commerce.

A copy of the formal complaint was served upon respondent and respondent did not file an answer to the complaint. On April 24, 1985, the Judicial Officer issued a Default Order, which was served on respondent on April 26, 1985. On May 13, 1985, respondent wrote a letter regarding this matter to the P.A.C.A. Branch of the Agricultural Marketing Service, which was forwarded to the Judicial Officer. On June 18, 1985, the Judicial Officer issued an order staying the order of April 24, 1985. On August 13, 1985, the Judicial Officer issued an Order Reopening After Default, which gave respondent 10 days to file an answer to the complaint. On August 27, 1985, respondent filed a verified answer to the complaint, in which it admitted in part, denied in part, and stated it had no knowledge of certain matters.

The amount claimed as damages in the formal complaint does not exceed $15,000.00, and, therefore, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Under this procedure, the verified pleadings of the parties are a part of the evidence in this case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of verified statements.

Findings of Fact

1. Complainant is a corporation whose address is 3048 White Horse Road, Greenville, South Carolina 29611.

2. Respondent, Grayson E. Lewis, is an individual doing business as Tomato of Virginia, whose address is P. O. Box 1622, Petersburg, Virginia 23803. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On or about June 14, 1984, complainant consigned 1064 crates of cantaloupes to respondent.

4. On or about June 14, 1984, the cantaloupes were shipped to respondent. Upon arrival, respondent accepted said cantaloupes.

5. Respondent has made no accounting or payment to complainant for said cantaloupes.

6. The complaint was filed on February 4, 1985, which was within nine months from the date the cause of action arose.

Conclusions

Respondent's answer denies that respondent was an individual doing business as Tomato of Virginia, claiming that Tomato of Virginia was a corporation. Secondly, respondent does not deny receipt of the produce, nor does it claim to have rejected it. Finally, respondent's answer claims Bill Fentress, an agent of respondent, didn't pay for the produce because of its condition.

As to respondent's claim that Tomato of Virginia was a corporation, we take official notice, pursuant to section 47.25(f) of the Rules of Practice Under the Perishable Agricultural Commodities Act (7 C.F.R. § 47.25(f)), of the records of the Department which disclose that Grayson E. Lewis was an individual licensed to to business as Tomato of Virginia. Respondent's license terminated on November 8, 1984.

Had the cantaloupes failed to conform to the requirements of respondent, respondent could have rejected them pursuant to section 2-601 of the Uniform Commercial Code. Not having properly rejected them, respondent accepted them. U.C.C. § 2-606.

Respondent's argument that Mr. Bill Fentress was without authority to contract for the produce need not be addressed since respondent accepted the cantaloupes. By accepting those cantaloupes, respondent became liable for their fair market value. Respondent claims that the cantaloupes had substantial decay. The inspection certificate attached to complainant's formal complaint shows that the investigation disclosed an average of 6% decay. We accept the inspection certificate as being accurate. Unfortunately for respondent, 6% decay does not constitute unmerchantable or worthless produce. Complainant has submitted the bill, originally made out to Food Lion of Petersburg, Virginia, with a price of $9.00 per carton. Respondent, has presented no evidence to dispute this value. Accounts of sale showing that the respondent sold the cantaloupes for a lower price, dump certificates which would constitute evidence of the number of crates of cantaloupes without any commercial value, or comparable unbiased and credible evidence of the value of the cantaloupes might have been acceptable to substantiate claims of lesser value. Since respondent failed to present such evidence, complainant's evidence of the cantaloupe's value is accepted.

Respondent, therefore, is liable to complainant for the price of $9,576.00 for the 1064 crates of cantaloupes he accepted from complainant. His failure to pay such sum is a violation of section 2 of the Act, for which reparation should be awarded with interest.

Order

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $9,576.00, with interest thereon at the rate of 13% per annum, from August 1, 1984, until paid.

Copies of this Decision and Order shall be served on the parties.

HEEREN BROTHERS, INC. *v.* B. G. MARKETING COMPANY PACA Docket No. 2-7263 Decision and Order filed March 13, 1987.

Assignment for Benefit of Creditors—Failure to pay.

Where complaint alleging failure to pay for produce contains invoices and bills of lading showing respondent received the produce, complainant has established a prima facie case and is entitled to reparation award where respondent's only defense is that it made an assignment of assets for the benefit of creditors under state law. Such assignments do not bear the reparations proceeding.

Peter V. Train, Presiding Officer.

Complainant, *pro se*.

Roger Schlossberg, Hagerstown, Maryland, for respondent.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought award of reparation in the amount of $8,663.45 in connection with the sale of 6 trucklots of apples in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent. On August 5, 1986, respondent's assignee filed what it styled "Answer to Complaint and Suggestion of Insolvency" in which the assignee asserted that respondent made a general assignment of all its assets to him and that he had no particular knowledge of the facts alleged in the complaint and therefore could neither admit nor deny the allegations of the complaint. The assignee also moved that this reparation proceeding be stayed pending a final accounting and distribution of respondent's assets. Respondent's motion was denied on August 28, 1986, on the basis that there is no provision in Maryland state law or federal law requiring that federal administrative proceedings be stayed because of the filing of an assignment for the benefit of creditors.

Since the amount claimed in damages does not exceed $15,000.00, the shortened procedure provided in Section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) applies. Under this procedure, the verified

complaint of the complainant as well as the Department's report of investigation are part of the evidence in the case. Respondent's answer, because it was unverified, is not part of the evidence. Additionally, both parties were given the opportunity to file evidence in form of verified statements. Neither party did so. Neither party filed a brief.

Findings of Fact

1. Complainant Heeren Brothers, Inc., is a corporation whose post office address is 1330 East Service Drive, S.W., Grand Rapids, Michigan 49503.

2. Respondent B.G. Marketing Company is a corporation whose address is P. O. Box 649, Hagerstown, Maryland 21741. At the time of the transactions involved herein, respondent was licensed under the Act.

3. Between March 5, 1986, and March 25, 1986, complainant sold 6 trucklots of apples in interstate commerce to respondent in the total amount of $8,663.45.

4. Respondent received and accepted the produce, but has paid nothing with respect to any of the transactions.

5. The complaint was filed on April 29, 1986, which was within nine months of the time the causes of action herein arose.

Conclusions

Complainant has made a prima facie showing in this case that it shipped the apples in question at a total invoice price of $8,663.45. (Complainant's Exhibits 1–6 to the complaint) Respondent's only defense was that it filed an assignment for the benefit of creditors under Maryland law.

Such assignments, however, do not provide a defense in reparation proceedings. *Arbittier Farms v. Top Banana Farmers Market, Inc.*, 42 Agric. Dec. 1272 (1983); *Fruit Salad, Inc. v. M. Egan Co., Inc.*, 42 Agric. Dec. 664 (1983). They do not cut off the rights of parties to proceed before the Secretary in reparation proceedings. Furthermore, a reparation order has effects not attendant to any other proceeding. For example, failure to pay a reparation award results in sanctions against licensees, and those individuals responsibly connected with corporate licensees. *See*, 7 U.S.C. §§ 499g, h.

There is no indication in the record that respondent did other than accept six shipments of apples in interstate commerce. Nor is there any evidence that there has been any payment to complainant by respondent or respondent's assignee. Respondent is therefore liable to complainant for the full purchase price of the apples, or $8,663.45. The failure of respondent to pay this amount to complainant is a violation of section 2 of the Act for which reparation should be awarded to the complainant with interest.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $8,663.45, with interest thereon at the rate of 13 percent per annum from May 1, 1986, until paid.

Copies hereof shall be served upon the parties.

HOMESTEAD TOMATO PACKING CO., INC. *V.* M. & M. PONTO, INC. PACA Docket No. 2-6964. Decision and Order filed March 9, 1987.

Contract price—Market News Service reports

Parties agreed that the contract price would be the price prevailing on the market for the following week. Prevailing price determined by averaging the prices found in the Market News Service Reports for that week.

Andrew Y. Stanton, Presiding Officer.

Complainant, *pro se*.

Respondent, *pro se*.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq*. A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $6,400.00 in connection with the sale of a truckload of tomatoes, in interstate commerce. A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability and asserting a counterclaim for $3,200.00 in connection with the subject matter of the complaint. Complainant filed a reply to the counterclaim, denying liability. Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements, and to file briefs. Complainant failed to submit any evidence in a timely fashion. Respondent submitted an answering statement. Both parties filed briefs.

Findings of Fact

1. Complainant, Homestead Tomato Packing Co., Inc., is a corporation whose address is P. O. Box 3064, Florida City, Florida. At the

time of the transaction involved herein, complainant was not licensed under the Act but was operating subject to license since it was engaged in selling perishable agricultural commodities, not of its own raising, in interstate commerce. The Department notified complainant, in a letter dated September 3, 1986, that it was operating subject to license and a license was, therefore, required.

2. Respondent, M. & M. Ponto, Inc., is a corporation whose address is P. O. Box 197, Syracuse, New York. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On January 18, 1985, complainant sold to respondent one truckload of 6 x 7 tomatoes, consisting of 1,600 cartons, 85% or better U.S. number one, f.o.b., at the established market price for the following week, January 20 through 26, 1985. Complainant shipped the tomatoes on January 19, 1985, in interstate commerce to respondent, who received and accepted them.

4. The Florida Fruit and Vegetable Report for Winter Park, Florida published by the Federal-State Market News Service, shows shipping point prices for 85% or better U. S. number one 6 x 7 tomatoes on Monday, January 21, 1985, at $7.50 to $8.00 per carton. No prices are given for January 22 and 23, 1985. The listings for January 24 and 25, 1985, show $16.00 per carton.

5. Respondent's employees engaged in numerous telephone conversations with employees from complainant from January 19, 1985, through the end of the month. Complainant never agreed to base the prices on anything other than the prevailing shipping point prices for the week of January 20 through January 26, 1985.

6. Respondent has paid complainant $19,440.00 for the truckload of tomatoes at issue, which complainant has accepted as partial payment of the $25,840.00 which it alleges to be due and owing.

7. A formal complaint was filed on June 10, 1985, which was within nine months from when the cause of action alleged herein accrued.

Conclusions

The facts are largely undisputed. Respondent purchased from complainant a truckload of 6 x 7 tomatoes, consisting of 1,600 cartons, 85% or better U.S. number one, on January 18, 1985. The parties agree that the f.o.b. price was to be based on the price prevailing during the week of January 20 through 26, 1985.

Complainant claims that the prevailing price was set late on Tuesday, January 22, 1985, at $16.00 per carton, for a total contract price, including $.15 per carton for pallets, of $25,840.00 for the 1,600 cartons. Respondent is alleged to be liable for the difference between the $25,840.00 contract price and the $19,440.00 remitted by respondent, or $6,400.00.

Respondent contends that the prevailing price was $11.00 per carton for U.S. number one tomatoes, and $10.00 per carton for the U.S.

Combination tomatoes allegedly shipped by complainant. Therefore, respondent asserts that its liability to complainant was only for $10.00 per carton, plus $.15 per carton for pallets, totaling $16,240.00. Respondent has filed a counterclaim for the difference between this sum and the $19,440.00 it paid to complainant, or $3,200.00.

The only issue in contention is the question of the prevailing market price during the week of January 20 through 26, 1985. In order to determine this price, we will take judicial notice of the prices set forth in the Federal-State Market News Service Reports for Winter Park, Florida. These Reports show price quotations for the tomatoes at issue, 6 x 7, 85% or better U.S. number one, only for January 21, 1985, at $7.50 to $8.00 per carton (of which $7.50 is considered the most representative price), and January 24 and 25, 1985, at $16.00 per carton (Finding of Fact 4). Therefore, the prevailing market price for the week of January 20 through 26, 1985, can most equitably be determined by taking the average of the three known prices during the week, or $13.17. We find this figure, plus $.15 per carton for pallets, totaling $21,312.00 for the 1,600 cartons, to be the contract price agreed to by the parties.

Respondent has paid $19,440.00, which complainant has accepted as partial payment. The difference between this figure and the agreed upon contract price of $21,312.00, or $1,872.00, is the amount for which respondent remains liable. Respondent's failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

In respondent's counterclaim, it asserts that the prevailing market price for the week of January 20 through 26, 1985, was $10.15 per carton. However, this alleged price is not based on any objective standard such as the Market News Service Reports, but on prices purportedly charged respondent by other sellers. Further, respondent's alleged price is for U.S. Combination grade, not 85% or better U.S. number one, the standard used in both the Market News Service Reports and the contract agreement between the parties. Respondent's allegations concerning the prevailing market price are, therefore, without merit, and its counterclaim must be dismissed.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $1,872.00, with interest thereon at the rate of 13 percent per annum, from March 1, 1985, until paid.

Respondent's counterclaim is hereby dismissed.

Copies of this order shall be served upon the parties.

IVAN A. HORST *v.* FARM FRESH SUPERMARKETS, INC. d/b/a CEDAR CLIFF PANTRY FRESH. PACA Docket No. 2-7419. Decision and Order filed March 20, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $4,862.85 in connection with shipments of perishable agricultural commodities in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 C.F.R. 47.9(d)).

Complainant, Ivan A. Horst, is an individual whose address is Box 136, Port Treverton, Pennsylvania. Respondent, Farm Fresh Supermarkets, Inc., t/d/b/a Cedar Cliff Pantry Fresh, is a corporation whose address is Cedar Cliff Mall, Camp Hill, Pennsylvania. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $4,862.85. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $4,862.85, with interest thereon at the rate of 13 percent per annum from August 1, 1985, until paid.

Copies of this order shall be served upon the parties.

LOFCHIE, INC. d/b/a BRUCE CO. *v.* ANTHONY GAGLIANO & CO., INC. PACA Docket No. 2-7052. Order filed March 20, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

On February 24, 1987, complainant's representative of record Oliveri notified the presiding officer that complainant wished to withdraw the complaint in this proceeding. Accordingly the complaint is hereby dismissed.

Copies hereof shall be served on the parties.

NORTHWOOD FRUIT COOPERATIVE, INC. v. B. G. MARKETING COMPANY PACA Docket No. 2-7323 Decision and Order filed March 13, 1987.

Assignment for benefit of creditors—Failure to pay.

Where complaint alleging failure to pay for produce contains invoices and bills of lading showing respondent received the produce, complaint has established a prima facie case and is entitled to reparation award where respondent's only defense is that it made an assignment of assets for the benefit of creditors under state law. Such assignments do not bear the reparations proceeding.

Peter V. Train, Presiding Officer.

Complainant, *pro se*.

Roger Schlossberg, Hagarstown, Maryland, for respondent

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought award of reparation in the amount of $4,423.00 in connection with the sale of apples in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent. On September 23, 1986, respondent's assignee filed what it styled "Answer to Complaint and Suggestion of Insolvency" in which the assignee asserted that respondent made a general assignment of all its assets to him and that he had no particular knowledge of the facts alleged in the complaint and therefore could neither admit nor deny the allegations of the complaint. The assignee also moved that this reparation proceeding be stayed pending a final accounting and distribution of respondent's assets. Respondent's motion was denied on October 21, 1986, on the basis that there is no provision in Maryland state law or federal law requiring that federal administrative proceedings be stayed because of the filing of an assignment for the benefit of creditors.

Since the amount claimed in damages does not exceed $15,000.00, the shortened procedure provided in Section 47.20 of the Rules of Practice (7 C.F.R. < 47.20) applies. Under this procedure, the verified complaint of the complainant as well as the Department's report of investigation are part of the evidence in the case. Respondent's answer, because it was unverified, is not part of the evidence. Addition-

ally, both parties were given the opportunity to file evidence in form of verified statements. Neither party did so. Neither party filed a brief.

Findings of Fact

1. Complainant Northwood Fruit Cooperative, Inc., is a corporation whose business address is P. O. Box 57, Shelby, Michigan 49455.

2. Respondent B.G. Marketing Company is a corporation whose address is P. O. Box 649, Hagerstown, Maryland 21741. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On February 14, 1986, complainant sold apples in interstate commerce to respondent in the amount of $2,825.00.

4. On February 24, 1986, complainant sold apples in interstate commerce to respondent in the amount of $1,598.00.

5. Respondent received and accepted the produce, but has paid nothing with respect to any of the transactions.

6. The complaint was filed on April 21, 1986, which was within nine months of the time the causes of action herein arose.

Conclusions

Complainant has made a prima facie showing in this case that it shipped the apples in question at a total invoice price of $4,423.00. (Complainant's Exhibits 1-4 to the complaint) Respondent's only defense was that it filed an assignment for the benefit of creditors under Maryland law.

Such assignments, however, do not provide a defense in reparation proceedings. *Arbittier Farms v. Top Banana Farmers Market, Inc.*, 42 Agric. Dec. 1272 (1983); *Fruit Salad, Inc. v. M. Egan Co., Inc.*, 42 Agric. Dec. 644 (1983). They do not cut off the rights of parties to proceed before the Secretary in reparation proceedings. Furthermore, a reparation order has effects not attendant to any other proceeding. For example, failure to pay a reparation award results in sanctions against licensees, and those individuals responsibly connected with corporate licensees. *See*, 7 U.S.C. §§ 499g, h.

There is no indication in the record that respondent did other than accept the shipments of apples in interstate commerce. Nor is there any evidence that there has been any payment to complainant by respondent or respondent's assignee. Respondent is therefore liable to complainant for the full purchase price of the apples, or $4,423.00. The failure of respondent to pay this amount to complainant is a violation of section 2 of the Act for which reparation should be awarded to the complainant with interest.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $4,423.00, with interest thereon at the rate of 13 percent per annum from April 1, 1986, until paid.

Copies hereof shall be served upon the parties.

EDWARD PITSCH PRODUCE, INC. *v.* B. G. MARKETING COMPANY
PACA Docket No. 2-7265. Decision and order filed March 12, 1987.

Assignment of benefit of creditors—Failure to pay

Where complaint alleging failure to pay for produce, contains copies of receipts, respondent gave complainant for the produce, complainant award where respondent's only defense is that it made an assignment of assets for the benefit of creditors under the state law. Such assignments do not bear the reparations proceedings.

Peter V. Train, presiding officer.

Edward J. Kehoe, Belmont, Michigan, for complainant.

Roger Schlossberg, Hagerstown, Maryland, for respondent.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought award of reparation in the amount of $70,092.62 in connection with the sale of 17 trucklots of apples in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent. On August 5, 1986, respondent's assignee filed what it styled "Answer to Complaint and Suggestion of Insolvency" in which the assignee asserted that respondent made a general assignment of all its assets to him and that he had no particular knowledge of the facts alleged in the complaint and therefore could neither admit nor deny the allegations of the complaint. The assignee also moved that this reparation proceeding be stayed pending a final accounting and distribution of respondent's assets. Respondent's motion was denied on August 28, 1986, on the basis that there is no provision in Maryland state law or federal law requiring that federal administrative proceedings be stayed because of the filing of an assignment for the benefit of creditors.

The parties waived oral hearing and therefore the shortened procedure provided in Section 47.20 of the Rules of Practice (7 C.F.R. < 47.20), is being used. Under this procedure, the verified complaint of the complainant as well as the Department's report of investigation are part of the evidence in the case. Respondent's answer, because it was unverified, is not part of the evidence. Additionally, both parties were given the opportunity to file evidence in form of verified statements. Neither party did so. Neither party filed a brief.

Findings of Fact

1. Complainant, Edward Pitsch Produce, Inc., is a corporation whose post office address is 6087 Bristol Road, N.W., Comstock Park, Michigan 49321.

2. Respondent, B.G. Marketing Company, is a corporation whose address is P. O. Box 649, Hagerstown, Maryland 21741. At the time of the transactions involved herein, respondent was licensed under the Act.

3. Between January 31, 1986, and March 25, 1986, complainant sold 17 trucklots of apples in interstate commerce to respondent in the total amount of $70,092.62. 2

4. Respondent received and accepted the produce, but has paid nothing with respect to any of the transactions.

5. The complaint was filed on April 29, 1986, which was within nine months of the time the causes of action herein arose.

Conclusions

Complainant has made a prima facie showing in this case that it shipped the apples in question at a total invoice price of $70,092.62. Complainant's Exhibits 1-17 to the complaint. Respondent's only defense was that it filed an assignment for the benefit of creditors under Maryland law.

Such assignments, however, do not provide a defense in reparation proceedings. *Arbittier Farms v. Top Banana Farmers Market, Inc.*, 42 Agric. Dec. 1272 (1983); *Fruit Salad, Inc. v. M. Egan Co., Inc.*, 42 Agric. Dec. 664 (1983). They do not cut off the rights of parties to proceed before the Secretary in reparation proceedings. Furthermore, a reparation order has effects not attendant to any other proceeding. For example, failure to pay a reparation award results in sanctions against licensees, and those individuals responsibly connected with corporate licensees. *See*, 7 U.S.C. §§ 499g, h.

There is no indication in the record that respondent did other than accept 17 shipments of apples in interstate commerce. Nor is there any evidence that there has been any payment to complainant by respondent or respondent's assignee. Respondent is therefore liable to complainant for the full purchase price of the apples, or $70,092.62. The failure of respondent to pay this amount to complainant is a violation of section 2 of the Act for which reparation should be awarded to the complainant with interest.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $70,092.62, with interest thereon at the rate of 13 percent per annum from May 1, 1986, until paid.

Copies hereof shall be served upon the parties.

RINEHART ORCHARDS, INC. *v.* B. G. MARKETING COMPANY PACA Docket No. 2-7311 Decision and order filed March 12, 1987.

Assignment for benefit of creditors—Failure to pay.

Where complaint alleging failure to pay for produce contains invoices and bills of lading showing respondent received the produce, complaint has established a prima facie case and is entitled to reparation award where respondent's only defense is that it made an assignment of assets for the benefit of creditors under state law. Such assignments do not bar the reparation proceeding.

Peter V. Train, Presiding Officer.

William C. Wantz, Hagerstown, Maryland, for complainant.

Roger Schlossberg, Hagerstown, Maryland, for respondent.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought award of reparation in the amount of $38,364.14 in connection with the sale of 27 trucklots of apples in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent. On September 3, 1986, respondent's assignee filed what it styled "Answer to Complaint and Suggestion of Insolvency" in which the assignee asserted that respondent made a general assignment of all its assets to him and that he had no particular knowledge of the facts alleged in the complaint and therefore could neither admit nor deny the allegations of the complaint. The assignee also moved that this reparation proceeding be stayed pending a final accounting and distribution of respondent's assets. Respondent's motion was denied on October 9, 1986, on the basis that there is no provision in Maryland state law or federal law requiring that federal administrative proceedings be stayed because of the filing of an assignment for the benefit of creditors.

The parties waived oral hearing and therefore the shortened procedure provided in Section 47.20 of the Rules of Practice (7 C.F.R. § 47.20), is being used. Under this procedure, the verified complaint of the complainant as well as the Department's report of investigation are part of the evidence in the case. Respondent's answer, because it was unverified, is not part of the evidence. Additionally, both parties were given the opportunity to file evidence in form of verified statements. Neither party did so. Neither party filed a brief.

Findings of Fact

1. Complainant Rinehart Orchards, Inc., is a corporation whose business address is Route 3, Box 233, Smithsburg, Maryland 21783.

2. Respondent B.G. Marketing Company is a corporation whose address is P. O. Box 649, Hagerstown, Maryland 21741. At the time of the transactions involved herein, respondent was licensed under the Act.

3. Between February 19, 1986, and March 21, 1986, complainant shipped 27 trucklots of apples in interstate commerce to respondent acting as a grower's agent for complainant in the total amount of $38,364.14.

4. Respondent accepted and sold the produce for complainant's account but has failed to remit the net proceeds with respect to any of the transactions.

5. The complaint was filed on June 5, 1986, which was within nine months of the time the causes of action herein arose.

Conclusions

Complainant has made a prima facie showing in this case that it shipped the apples in question at a total invoice price of $38,364.14. (Complainant's Exhibits 1-28 to the complaint) Respondent's only defense was that it filed an assignment for the benefit of creditors under Maryland law.

Such assignments, however, do not provide a defense in reparation proceedings. *Arbittier Farms v. Top Banana Farmers Market, Inc.*, 42 Agric. Dec. 1272 (1983); *Fruit Salad, Inc. v. M. Egan Co., Inc.*, 42 Agric. Dec. 664 (1983). They do not cut off the rights of parties to proceed before the Secretary in reparation proceedings. Furthermore, a reparation order has effects not attendant to any other proceeding. For example, failure to pay a reparation award results in sanctions against licensees, and those individuals responsibly connected with cor-

RINEHART ORCHARDS, INC. *v.* B. G. MARKETING COMPANY PACA Docket No. 2-7311 Decision and order filed March 12, 1987.

Assignment for benefit of creditors—Failure to pay.

Where complaint alleging failure to pay for produce contains invoices and bills of lading showing respondent received the produce, complaint has established a prima facie case and is entitled to reparation award where respondent's only defense is that it made an assignment of assets for the benefit of creditors under state law. Such assignments do not bar the reparation proceeding.

Peter V. Train, Presiding Officer.

William C. Wantz, Hagerstown, Maryland, for complainant.

Roger Schlossberg, Hagerstown, Maryland, for respondent.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought award of reparation in the amount of $38,364.14 in connection with the sale of 27 trucklots of apples in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent. On September 3, 1986, respondent's assignee filed what it styled "Answer to Complaint and Suggestion of Insolvency" in which the assignee asserted that respondent made a general assignment of all its assets to him and that he had no particular knowledge of the facts alleged in the complaint and therefore could neither admit nor deny the allegations of the complaint. The assignee also moved that this reparation proceeding be stayed pending a final accounting and distribution of respondent's assets. Respondent's motion was denied on October 9, 1986, on the basis that there is no provision in Maryland state law or federal law requiring that federal administrative proceedings be stayed because of the filing of an assignment for the benefit of creditors.

The parties waived oral hearing and therefore the shortened procedure provided in Section 47.20 of the Rules of Practice (7 C.F.R. § 47.20), is being used. Under this procedure, the verified complaint of the complainant as well as the Department's report of investigation are part of the evidence in the case. Respondent's answer, because it was unverified, is not part of the evidence. Additionally, both parties were given the opportunity to file evidence in form of verified statements. Neither party did so. Neither party filed a brief.

Findings of Fact

1. Complainant Rinehart Orchards, Inc., is a corporation whose business address is Route 3, Box 233, Smithsburg, Maryland 21783.

2. Respondent B.G. Marketing Company is a corporation whose address is P. O. Box 649, Hagerstown, Maryland 21741. At the time of the transactions involved herein, respondent was licensed under the Act.

3. Between February 19, 1986, and March 21, 1986, complainant shipped 27 trucklots of apples in interstate commerce to respondent acting as a grower's agent for complainant in the total amount of $38,364.14.

4. Respondent accepted and sold the produce for complainant's account but has failed to remit the net proceeds with respect to any of the transactions.

5. The complaint was filed on June 5, 1986, which was within nine months of the time the causes of action herein arose.

Conclusions

Complainant has made a prima facie showing in this case that it shipped the apples in question at a total invoice price of $38,364.14. (Complainant's Exhibits 1–28 to the complaint) Respondent's only defense was that it filed an assignment for the benefit of creditors under Maryland law.

Such assignments, however, do not provide a defense in reparation proceedings. *Arbittier Farms v. Top Banana Farmers Market, Inc.*, 42 Agric. Dec. 1272 (1983); *Fruit Salad, Inc. v. M. Egan Co., Inc.*, 42 Agric. Dec. 664 (1983). They do not cut off the rights of parties to proceed before the Secretary in reparation proceedings. Furthermore, a reparation order has effects not attendant to any other proceeding. For example, failure to pay a reparation award results in sanctions against licensees, and those individuals responsibly connected with corporate licensees. *See*, 7 U.S.C. §§ 499g, h.

There is no indication in the record that respondent did other than accept and sell on complainant's behalf 27 shipments of apples in interstate commerce. Nor is there any evidence that there has been any payment to complainant by respondent or respondent's assignee. Respondent is therefore liable to complainant for the full purchase price of the apples, or $38,364.14. The failure of respondent to pay this amount to complainant is a violation of section 2 of the Act for which reparation should be awarded to the complainant with interest.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $38,364.14, with interest thereon at the rate of 13 percent per annum from May 1, 1986, until paid.

Copies hereof shall be served upon the parties.

SHOEMAKER ORCHARDS, INC. v. B. G. MARKETING COMPANY
PACA Docket No. 2-7264. Decision and order filed March 20, 1987.

Assignment for benefit of creditors—Failure to pay.

Where complaint alleging failure to pay for produce contains invoices and bills of lading showing respondent received the produce, complaint has established a prima facie case and is entitled to reparation award where respondent's only defense is that it made an assignment of assets for the benefit of creditors under state law. Such assignments do not bear the reparations proceeding.

Peter V. Train, Presiding Officer.

Complainant, *pro se*.

Roger Schlossberg, Hagerstown, Maryland, for respondent

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought award of reparation in the amount of $15,130.90 in connection with the sale of 4 trucklots of apples in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent. On August 5, 1986, respondent's assignee filed what it styled "Answer to Complaint and Suggestion of Insolvency" in which the assignee asserted that respondent made a general assignment of all its assets to him and that he had no particular knowledge of the facts alleged in the complaint and therefore could neither admit nor deny the allegations of the complaint. The assignee also moved that this reparation proceeding be stayed pending a final accounting and distribution of respondent's assets. Respondent's motion was denied on August 28, 1986, on the basis that there is no provision in Maryland state law or federal law requiring that federal administrative proceedings be stayed because of the filing of an assignment for the benefit of creditors.

The parties waived oral hearing and therefore the shortened proce-
n 47.20 of the Rules of Practice (7 C.F.R. §
nder this procedure, the verified complaint of
is the Department's report of investigation are
he case. Respondent's answer, because it was
the evidence. Additionally, both parties were
file evidence in form of verified statements.
either party filed a brief.

Findings of Fact

1. Complainant Shoemaker Orchards, Inc., is a corporation whose post office address is R.D. 2, Box 2320, Mt. Bethel, Pennsylvania 18343.

2. Respondent B.G. Marketing Company is a corporation whose address is P. O. Box 649, Hagerstown, Maryland 21741. At the time of the transactions involved herein, respondent was licensed under the Act.

3. Between February 4, 1986, and March 10, 1986, complainant sold 4 trucklots of apples in interstate commerce to respondent acting as a grower's agent for complainant in the total amount of $15,130.90.

4. Respondent accepted and sold the produce, but has failed to remit the net proceeds with respect to any of the transactions.

5. The complaint was filed on May 20, 1986, which was within nine months of the time the causes of action herein arose.

Conclusions

Complainant has made a prima facie showing in this case that it shipped the apples in question at a total invoice price of $15,130.90 through the exhibits attached to its complaint. Respondent's only defense was that it filed an assignment for the benefit of creditors under Maryland law.

Such assignments, however, do not provide a defense in reparation proceedings. *Arbittier Farms v. Top Banana Farmers Market, Inc.*, 42 Agric. Dec. 1272 (1983); *Fruit Salad, Inc. v. M. Egan Co., Inc.*, 42 Agric. Dec. 664 (1983). They do not cut off the rights of parties to proceed before the Secretary in reparation proceedings. Furthermore, a reparation order has effects not attendant to any other proceeding. For example, failure to pay a reparation award results in sanctions against licensees, and those individuals responsibly connected with corporate licensees. *See*, 7 U.S.C. §§ 499g, h.

There is no indication in the record that respondent did other than accept and sell on complainant's behalf 4 shipments of apples in interstate commerce. Nor is there any evidence that there has been any payment to complainant by respondent or respondent's assignee. Respondent is therefore liable to complainant for the full purchase price of the apples, or $15,130.90. The failure of respondent to pay this amount to complainant is a violation of section 2 of the Act for which reparation should be awarded to the complainant with interest.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $15,130.90, with interest thereon at the rate of 13 percent per annum from April 1, 1986, until paid.

Copies hereof shall be served upon the parties.

SOUTHLAND PRODUCE COMPANY d/b/a WESTERN FRUIT SALES *v.* PAT PEREZ PRODUCE CO., INC. PACA Docket No. 2-7408. Order filed March 13, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $3,897.50 in connection with a shipment of mangos in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 C.F.R. 47.9(d)).

Complainant, Southland Produce Company, d/b/a Western Fruit Sales Company, is a corporation whose address is P. O. Box 21037, Los Angeles, California. Respondent, Pat Perez Produce Co., Inc., is a corporation whose address is 2001 Taylor Street, Dallas, Texas. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $3,897.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $3,897.50, with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid.

Copies of this order shall be served upon the parties.

TREXLER GROWERS, INC. *v.* B. G. MARKETING COMPANY. PACA Docket No. 2-7316. Decision and order filed March 12, 1987.

Assignment for benefit of creditors—Failure to pay.

Where complaint alleging failure to pay for produce contains invoices and bills of lading showing respondent received the produce, complaint has established a prima facie case and is entitled to reparation award where respondent's only benefit of creditors under state law. Such assignments do not bar the reparations proceeding.

Peter V. Train, Presiding officer.

Charles W. Stopp, Slatington, Pennsylvania, for complainant.
Roger Schlossberg, Hagerstown, Maryland, for respondent
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. < 499a *et seq.*). A timely complaint was filed in which complainant sought award of reparation in the amount of $41,369.50 in connection with the sale of 11 trucklots of apples in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent. On September 3, 1986, respondent's assignee filed what it styled "Answer to Complaint and Suggestion of Insolvency" in which the assignee asserted that respondent made a general assignment of all its assets to him and that he had no particular knowledge of the facts alleged in the complaint and therefore could neither admit nor deny the allegations of the complaint. The assignee also moved that this reparation proceeding be stayed pending a final accounting and distribution of respondent's assets. Respondent's motion was denied on October 14, 1986, on the basis that there is no provision in Maryland state law or federal law requiring that federal administrative proceedings be stayed because of the filing of an assignment for the benefit of creditors.

The parties waived oral hearing and therefore the shortened procedure provided in Section 47.20 of the Rules of Practice (7 C.F.R. < 47.20), is being used. Under this procedure, the verified complaint of the complainant as well as the Department's report of investigation are part of the evidence in the case. Respondent's answer, because it was unverified, is not part of the evidence. Additionally, both parties were given the opportunity to file evidence in form of verified statements. Complainant filed an opening statement; respondent did not. Neither party filed a brief.

Findings of Fact

1. Complainant Trexler Growers, Inc., is a corporation whose business address is R. D. #1, Box 86, Orefield, Pennsylvania 18069.

2. Respondent B.G. Marketing Company is a corporation whose address is P. O. Box 649, Hagerstown, Maryland 21741. At the time of the transactions involved herein, respondent was licensed under the Act.

3. Between February 10, 1986, and March 19, 1986, complainant sold 11 trucklots of apples in interstate commerce to respondent in the total amount of $41,369.50.

4. Respondent received and accepted the produce, but has paid nothing with respect to any of the transactions.

5. The complaint was filed on June 9, 1986, which was within nine months of the time the causes of action herein arose.

Conclusions

Complainant has made a prima facie showing in this case that it shipped the apples in question at a total invoice price of $41,369.50. (Complainant's Exhibits 1-17 to the complaint) Respondent's only defense was that it filed an assignment for the benefit of creditors under Maryland law.

Such assignments, however, do not provide a defense in reparation proceedings. *Arbittier Farms v. Top Banana Farmers Market, Inc.*, 42 Agric. Dec. 1272 (1983); *Fruit Salad, Inc. v. M. Egan Co., Inc.*, 42 Agric. Dec. 664 (1983). They do not cut off the rights of parties to proceed before the Secretary in reparation proceedings. Furthermore, a reparation order has effects not attendant to any other proceeding. For example, failure to pay a reparation award results in sanctions against licensees, and those individuals responsibly connected with corporate licensees. *See*, 7 U.S.C. §§ 499g, h.

There is no indication in the record that respondent did other than accept 11 shipments of apples in interstate commerce. Nor is there any evidence that there has been any payment to complainant by respondent or respondent's assignee. Respondent is therefore liable to complainant for the full purchase price of the apples, or $41,369.50. The failure of respondent to pay this amount to complainant is a violation of section 2 of the Act for which reparation should be awarded to the complainant with interest.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $41,369.50, with interest thereon at the rate of 13 percent per annum from May 1, 1986, until paid.

Copies hereof shall be served upon the parties.

DAVE WESTENDORF PRODUCE SALES, INC. *v.* JOHN LIVACICH PRODUCE, INC., a/t/a VISTA SALES. PACA Docket 2-6807. Decision and Order issued March 20, 1987.

Acceptance, burden of proof on respondent—Evidence, effect of verification —Federal inspection, weight of evidence when made four days after arrival—Dump certificates, need for authentication.

Where respondent accepted tomatoes in a delivered sale, it had burden of proof to show they did not meet contract requirements. A federal inspection taken four days after acceptance was too late to show condition on arrival, as also were dump certificates which were incomplete as to dates of dumping and were unverified. Finding for complainant.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. 499a *et seq.* A timely complaint was filed in which complainant sought a reparation award against respondent in the amount of $10,409.60 in connection with a sale of tomatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served on each party. A copy of the formal complaint was served on respondent, which filed an answer thereto, denying liability and asserting a counterclaim. Complainant filed a reply thereto.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice, 7 C.F.R. <47.20, is applicable. Pursuant to that procedure, the report of investigation is considered a part of the evidence, as are the verified complaint and answer. Each party was given notice of opportunity to submit additional evidence in the form of verified statements, and to file briefs, but nothing was received in response to those notices.

Findings of Fact

1. Complainant at all times material herein was a corporation with a place of business in San Clemente, California and licensed under the Act.

2. Respondent at all times material herein was a corporation with a place of business in Vista, California and licensed under the Act.

3. On Thursday, March 22, 1984, certain tomatoes were sold by complainant to respondent for a total price of $10,409.60 delivered at Vista, California. They were shipped from Nogales, Arizona to respondent at Vista, arriving Friday, March 23. They were accepted by respondent upon arrival.

4. Of the $10,409.60 price, respondent has paid half, $5,204.80, leaving the same amount unpaid.

5. A formal complaint was received by the Department on October 5, 1984, within nine months of accrual of the cause of action alleged therein.

Conclusions

On Thursday, March 22, 1984, a truckload of 1,716 cartons of tomatoes, of various sizes but all at the same price per carton, was sold by complainant to respondent, for a total price of $10,409.60 delivered at Vista, California. They were purchased by complainant at Nogales, Arizona and shipped from there to respondent's place of business at Vista, arriving the next day, Friday, March 23. The parties agreed that the tomatoes would have "breaker" color and be in merchantable condition. They were accepted by respondent upon arrival. Respondent

has paid complainant half of the $10,409.60 price, $5,204.80, leaving the same amount unpaid. This much is undisputed.

Respondent contended that the tomatoes shipped were green in color and not merchantable upon arrival. It submitted a letter releasing its $5,204.80 check as an undisputed amount, but later counterclaimed.

Complainant must prevail on the basis of the facts which are undisputed as shown above, and the evidence in the record of the case. The evidence in the record in support of respondent's contention stated above is not sufficient to establish its merit. It is undisputed that the tomatoes were accepted by respondent, as shown above, and the burden is on a buyer to establish any breach with respect to goods accepted. *Theron Hooker Co. v. Ben Gatz Co.*, 30 Ag. Dec. 1109 (1971). See also U.C.C. §2-607(1), (2), (3) and (4).

Respondent's answer and counterclaim, which is verified by oath, states that the tomatoes shipped were green color and not merchantable, as respondent contended. However, that document is not persuasive evidence of color and condition of the tomatoes upon arrival at Vista, California on March 23, 1984, because it does not show when the tomatoes were first inspected after arrival.

The record contains a copy of a letter dated July 13, 1984, to the Department, on respondent's letterhead, signed Lori Livacich, Sales Manager, reciting among other things that the color was too light. That letter also does not show when the tomatoes were first inspected after arrival. Also, it is not verified, by oath or otherwise.

The record contains copies of a federal inspection certificate dated Tuesday, March 27, 1984, four days after arrival, reflecting inspection of tomatoes at Vista, California. That certificate shows inspection of only "4 accessible pallets," and that only 800, or less than half of the 1,716 cartons shipped, were available for inspection. Also, it shows the tomatoes which were inspected as 85% red, and as varying in temperature from 43- to 71- in various cartons, on the date of inspection, four days after arrival.

The record also contains copies of a federal inspection certificate dated Thursday, March 29, 1984, six days after arrival at Vista, California, reflecting inspection of tomatoes at King City, California. The number inspected is shown in that certificate as "applicant states 725 lugs." "Actually 649" was written after that by someone not identified in the record. Clearly, that certificate reflects inspection of less than half of the 1,716 cartons shipped to Vista, more than six days after arrival at Vista.

Since both parties submitted copies of those certificates, we take it as undisputed that the tomatoes referred to in them are some of the ones in dispute. Any such certificate is persuasive evidence of what it shows. However, on the basis of what they show as explained above, those

certificates are not persuasive evidence that the 1,716 cartons of tomatoes were green in color and not in merchantable condition upon arrival at Vista on March 23, 1984. This is a finding limited to those ceitificates only and does not necessarily reflect a general rule.

Respondent submitted two pieces of paper which reflect dumping of tomatoes, signed Leo Oliveris and Joe Murguia. The record does not contain sufficient verification, in those papers or others, that the tomatoes to which they refer are some of the ones in dispute. One of them, dated April 10, 1984, does not show the date of the dumping to which it refers. Also, they are not verified, by oath or otherwise.

On the basis of the above, respondent's failure to pay in full for the tomatoes is found to be a violation of Section 2(4) of the Act, 7 U.S.C 499b(4), for which reparation should be awarded with interest.

Order

Within 30 days of the date of this order, respondent shall pay to complainant as reparation $5,204.80 with inteiest thereon at the rate of 13% per annum from May 1, 1984 until paid.

Respondent's counterclaim is hereby dismissed.

Copies of this order shall be served on the parties.

REPARATION DEFAULT DECISIONS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER (Summarized)

BENNY PRODUCE CO. *v.* FLAMINGO PRODUCE SALES INC. PACA Docket No. RD-87-138. Default order issued March 6, 1987.

Respondent was ordered to pay complainant, as reparation, $38,948.50 plus 13 percent interest thereon per annum from April 1, 1986, until paid.

ALPHONSE C. BIANCO *v.* TOC PRODUCE DISTRIBUTORS CORP. a/t/a CENTER PRODUCE. PACA Docket No. RD-87-125. Default order issued March 2, 1987.

Respondent was ordered to pay complainant, as reparation, $7,425.00 plus 13 percent interest thereon per annum from October 1, 1985, until paid.

WM. BOLTHOUSE FARMS INC. *v.* B. G. MARKETING COMPANY. PACA Docket No. RD-87-168. Default order issued March 30, 1987.

Respondent was ordered to pay complainant, as reparation, $6,337.95 plus 13 percent interest thereon per annum from April 1, 1986, until paid.

BRICE BROS. INC. *v.* BERTIS PRODUCE CO. INC. PACA Docket No. RD-87-170. Default order issued March 30, 1987.

Respondent was ordered to pay complainant, as reparation, $559.04 plus 13 percent interest thereon per annum from April 1, 1986, until paid.

GEORGE CARATAN AND ANTON G. CARATAN d/b/a ANTON CARATAN & SON *v.* J & J CITRUS CO. INC. PACA Docket No. RD-87-159. Default order issued March 25, 1987.

Respondent was ordered to pay complainant, as reparation, $101,209.79 plus 13 percent interest thereon per annum from May 1, 1985, until paid.

CCJM INC. AND MAGGIO INC. d/b/a MAGGIO COMPANY *v.* RICHARD ITULE PRODUCE INC. PACA Docket No. RD-87-145. Default order issued March 17, 1987.

Respondent was ordered to pay complainant, as reparation, $2,860.45 plus 13 percent interest thereon per annum from March 1, 1986, until paid.

CHIQUITA BRANDS INC. *v.* RICHARD ITULE PRODUCE INC. PACA Docket No. RD-87-143. Default order issued March 17, 1987.

Respondent was ordered to pay complainant, as reparation, $6,187.50 plus 13 percent interest thereon per annum from July 1, 1986, until paid.

JOS. CIMINO FOODS INC. *v.* SILVERIO LAMAS d/b/a VALLEY GROWN PRODUCE SALES. PACA Docket No. RD-87-158. Default order issued March 25, 1987.

Respondent was ordered to pay complainant, as reparation, $81,111.60 plus 13 percent interest thereon per annum from October 1, 1985, until paid.

COUNTRY PRODUCE INC. *v.* CHRIS SPIRIDIS d/b/a EASTERN FARMERS EXCHANGE CO. PACA Docket No. RD-87-156. Default Order issued March 23, 1987.

Respondent was ordered to pay complainant, as reparation, $7,727.50 plus 13 percent interest thereon per annum from May 1, 1986, until paid.

DESERT DIAMOND SALES *v.* RICHARD ITULE PRODUCE INC. PACA Docket No. RD-87-129. Default order issued March 2, 1987.

Respondent was ordered to pay complainant, as reparation, $2,525.00 plus 13 percent interest thereon per annum from June 1, 1986, until paid.

DON-A-LYNN PRODUCE INC. *v.* MELON PRODUCE INC. PACA Docket No. RD-87-132. Default order issued March 4, 1987.

Respondent was ordered to pay complainant, as reparation, $15,758.25 plus 13 percent interest thereon per annum from December 1, 1985, until paid.

DOUBLE E SALES INC. *v.* GORE & FRANK INC. PACA Docket No. RD-87-128. Default order issued March 2, 1987.

Respondent was ordered to pay complainant, as reparation, $8,400.00 plus 13 percent interest thereon per annum from June 1, 1986, until paid.

A. DUDA & SONS INC. *v.* WAYNE EASLEY d/b/a CRAFT TOMATO CO. PACA Docket No. RD-87-136. Default order issued March 6, 1987.

Respondent was ordered to pay complainant, as reparation, $2,760.00 plus 13 percent interest thereon per annum from December 1, 1985, until paid.

ELMORE AND STAHL INC. *v.* T & L DISTRIBUTORS INC. PACA Docket No. RD-87-140. Default order issued March 6, 1987.

Respondent was ordered to pay complainant, as reparation, $1,800.00 plus 13 percent interest thereon per annum from May 1, 1986, until paid.

FAIRVIEW ORCHARDS ASSOCIATES *v.* B. G. MARKETING COMPANY. PACA Docket No. RD-87-166. Default order issued March 27, 1987.

Respondent was ordered to pay complainant, as reparation, $41,872.10 plus 13 percent interest thereon per annum from April 1, 1986, until paid.

FLORIDA TOMATO PACKERS INC. *v.* JOSEPH PINTO d/b/a JOE PINTO & SON. PACA Docket No. RD-87-161. Default order issued March 25, 1987.

Respondent was ordered to pay complainant, as reparation, $5,260.00 plus 13 percent interest thereon per annum from May 1, 1986, until paid.

FLORIZA SALES CO. INC. *v.* JOE PINTO & SON INC. PACA Docket No. RD-87-162. Default Order issued March 25, 1987.

Respondent was ordered to pay complainant, as reparation, $4,876.20 plus 13 percent interest thereon per annum from March 1, 1986, until paid.

GRAY'S GROVES INC. a/t/a GRAY'S ORANGE BARN *v.* A.V. CANCELMO, III d/b/a A. CANCELMO CO. PACA Docket No. RD-87-163. Default Order issued March 27, 1987.

Respondent was ordered to pay complainant, as reparation, $7,291.32 plus 13 percent interest thereon per annum from January 1, 1986, until paid.

MARK L. HANESS d/b/a C. J.'S BROKERAGE *v.* RICHARD ITULE PRODUCE INC. PACA Docket No. RD-87-144. Default order issued March 17, 1987.

Respondent was ordered to pay complainant, as reparation, $26,799.85 plus 13 percent interest thereon per annum from July 1, 1986, until paid.

MARK L. HANESS d/b/a C. J.'S BROKERAGE *v.* B. H. COMPANY, INC. PACA Docket No. RD-87-150. Default order issued March 19, 1987.

Respondent was ordered to pay complainant, as reparation, $20,530.00 plus 13 percent interest thereon per annum from June 1, 1986, until paid.

MARK L. HANESS d/b/a C. J.'S BROKERAGE *v.* GUADALUPE G. FONSECA d/b/a LA BODEGA. PACA Docket No. RD-87-154. Default order issued March 23, 1987.

Respondent was ordered to pay complainant, as reparation, $5,600.00 plus 13 percent interest thereon per annum from April 1, 1986, until paid.

HARVEST TIME PRODUCE *v.* RICHARD ITULE PRODUCE INC. PACA Docket No. RD-87-146. Default order issued March 17, 1987.

Respondent was ordered to pay complainant, as reparation, $4,812.00 plus 13 percent interest thereon per annum from July 1, 1986, until paid.

HOVERSEN & SONS *v.* SCHAUMBURG PRODUCE INC. PACA Docket No. RD-87-130. Default order issued March 4, 1987.

Respondent was ordered to pay complainant, as reparation, $365.00 plus 13 percent interest thereon per annum from April 1, 1986, until paid.

WILLIAM E. KEIM d/b/a WILLIAM E. KEIM ORCHARDS *v.* B. G. MARKETING COMPANY. PACA Docket No. RD-87-167. Default order issued March 27, 1987.

Respondent was ordered to pay complainant, as reparation, $14,746.80 plus 13 percent interest thereon per annum from April 1, 1986, until paid.

KINGS CANYON FRUIT SALES CORP. *v.* JOE PINTO & SON INC. PACA Docket No. RD-87-126. Default order issued March 2, 1987.

Respondent was ordered to pay complainant, as reparation, $914.40 plus 13 percent interest thereon per annum from November 1, 1985, until paid.

L & M BROKERAGE COMPANY INC. *v.* BRETT M. WEST d/b/a TRI-CITY PRODUCE. PACA Docket No. RD-87-172. Default order issued March 30, 1987.

Respondent was ordered to pay complainant, as reparation, $17,349.00 plus 13 percent interest thereon per annum from July 1, 1986, until paid.

JAMES MATRO AND GAETANO MATRO d/b/a JAMES MATRO & SON *v.* CHRIS SPIRIDIS d/b/a EASTERN FARMERS EXCHANGE CO. PACA Docket No. RD-87-155. Default order issued March 23, 1987.

Respondent was ordered to pay complainant, as reparation, $1,193.00 plus 13 percent interest thereon per annum from February 1, 1986, until paid.

MCDANIEL FRUIT CO. *v.* RICHARD ITULE PRODUCE INC. PACA Docket No. RD-87-134. Default order issued March 4, 1987.

Respondent was ordered to pay complainant, as reparatior $14,532.00 plus 13 percent interest thereon per annum from May 1 1986, until paid.

MIDDLE MOUNTAIN LAND AND PRODUCE INC. *v.* JOHN MANNING PACA Docket No. RD-87-142. Default order issued March 17, 1987

Respondent was ordered to pay complainant, as reparation, $10,934.00 plus 13 percent interest thereon per annum from January 1, 1986, until paid.

MOUNTAIN FRESH PACKERS INC. *v.* INTERCONTINENTAL BROKERAGE & DISTRIBUTION CORP. PACA Docket No. RD-87-141. Default order issued March 6, 1987.

Respondent was ordered to pay complainant, as reparation, $5,652.00 plus 13 percent interest thereon per annum from February 1, 1986, until paid.

ROBERT A. NEWNUM d/b/a NEWNUM FARMS *v.* SWEETIE PIES COMPANY. PACA Docket No. RD-87-148. Default order issued March 19, 1987.

Respondent was ordered to pay complainant, as reparation, $4,500.00 plus 13 percent interest thereon per annum from April 1, 1986, until paid.

PANDOL BROS. INC. *v.* RICHARD ITULE PRODUCE INC. PACA Docket No. RD-87-147. Default order issued March 19, 1987.

Respondent was ordered to pay complainant, as reparation, $51,460.00 plus 13 percent interest thereon per annum from April 1, 1986, until paid.

PISMO-OCEANO VEGETABLE EXCHANGE *v.* STEVEN K. CHUNG d/b/a LEE'S MARKET PRODUCE. PACA Docket No. RD-87-169. Default order issued March 30, 1987.

Respondent was ordered to pay complainant, as reparation, $12,849.40 plus 13 percent interest thereon per annum from July 1, 1986, until paid.

RANCHO SALES CO. *v.* ROBERT BARONCINI d/b/a KORMAN TRADING INTERNATIONAL. PACA Docket No. RD-87-139. Default order issued March 6, 1987.

Respondent was ordered to pay complainant, as reparation, $2,073.60 plus 13 percent interest thereon per annum from February 1, 1986, until paid.

R. B. PACKING INC. *v.* FLAMINGO PRODUCE SALES INC. PACA Docket No. RD-87-131.

Default order issued March 4, 1987.Respondent was ordered to pay complainant, as reparation, $26,440.65 plus 13 percent interest thereon per annum from April 1, 1986, until paid.

RIO GRANDE ONIONS INC. *v.* B. H. COMPANY INC. PACA Docket No. RD-87-165. Default order issued March 27, 1987.

Respondent was ordered to pay complainant, as reparation, $2,152.25 plus 13 percent interest thereon per annum from June 1, 1986, until paid.

MICHAEL L. ROSE d/b/a ROSELAND FARMS *v.* WORLD FOODS INC. a/t/a WORLD PRODUCE. PACA Docket No. RD-87-157. Default order issued March 23, 1987.

Respondent was ordered to pay complainant, as reparation, $1,410.00 plus 13 percent interest thereon per annum from October 1, 1985, until paid.

CHRISTIAN SALVESON PACKING AND MARKETING COMPANY, Formerly: UNITED PACKING CO. *v.* JOE PINTO & SON INC. PACA Docket No. RD-87-160. Default order issued March 25, 1987.

Respondent was ordered to pay complainant, as reparation, $17,400.00 plus 13 percent interest thereon per annum from January 1, 1986, until paid.

THE SINGLETON CO., INC. *v.* FRANK W. DELEGAL, JR. d/b/a FRANK DELEGAL, JR. PACA Docket No. RD-87-124. Default order issued March 4, 1987.

Respondent was ordered to pay complainant, as reparation, $52,312.00 plus 13 percent interest thereon per annum from December 1, 1985, until paid.

SKOOKUM INC. *v.* CHINOOK MARKETING CO. INC. PACA Docket No. RD-87-133. Default order issued March 4, 1987.

Respondent was ordered to pay complainant, as reparation, $1,407.00 plus 13 percent interest thereon per annum from April 1, 1986, until paid.

STARKEY FARMS CO. INC. *v.* LYNDA CORPORATION a/t/a AIRWAY CELLO PACK. PACA Docket No. RD-87-135. Default order issued March 6, 1987.

Respondent was ordered to pay complainant, as reparation, $13,225.00 plus 13 percent interest thereon per annum from May 1, 1986, until paid.

SUNSPROUTS OF TEXAS INC. *v.* BROTHERS WHOLESALE PRODUCE INC. PACA Docket No. RD-87-149. Default order issued March 19, 1987.

Respondent was ordered to pay complainant, as reparation, $1,715.50 plus 13 percent interest thereon per annum from March 1, 1986, until paid.

TANITA INC. *v.* B. H. COMPANY INC. PACA Docket No. RD-87-151. Default order issued March 19, 1987.

Respondent was ordered to pay complainant, as reparation, $5,313.75 plus 13 percent interest thereon per annum from May 1, 1986, until paid.

TEX-SUN PRODUCE INC. v. FRANK S. MEDRANO d/b/a FRANK'S PRODUCE. PACA Docket No. RD-87-171. Default order issued March 30, 1987.

Respondent was ordered to pay complainant, as reparation, $6,529.67 plus 13 percent interest thereon per annum from June 1, 1986, until paid.

VEGCO INC. *v.* BLAS S. CATALANI d/b/a BLAS CATALANI BROKERAGE. PACA Docket No. RD-87-127. Default order issued March 2, 1987.

Respondent was ordered to pay complainant, as reparation, $5,692.50 plus 13 percent interest thereon per annum from August 1, 1985, until paid.

TONY VITRANO COMPANY *v.* QUALITY MASTERS INC. PACA Docket No. RD-87-137. Default order issued March 6, 1987.

Respondent was ordered to pay complainant, as reparation, $25,371.00 plus 13 percent interest thereon per annum from July 1, 1986, until paid.

CHARLES WETEGROVE CO. INC. *v.* VINCENT D. MAENZA d/b/a VINCENT MAENZA BANANA CO. a/t/a MAENZA & SONS. PACA Docket No. RD-87-164. Default Order issued March 27, 1987.

Respondent was ordered to pay complainant, as reparation, $3,578.75 plus 13 percent interest thereon per annum from June 1, 1986, until paid.

L&J MARKETING CO. *v.* RAVARINO PRODUCE CO., INC. PACA Docket No. RD-87-50. Order filed March 3, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 C.F.R. 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the proposed answer submitted by respondent is hereby ordered filed.

VEGCO INC. v. BLAS S. CATALANI d/b/a BLAS CATALANI BROKERAGE. PACA Docket No. RD-87-127. Default order issued March 2, 1987.

Respondent was ordered to pay complainant, as reparation, $5,692.50 plus 13 percent interest thereon per annum from August 1, 1985, until paid.

TONY VITRANO COMPANY v. QUALITY MASTERS INC. PACA Docket No. RD-87-137. Default order issued March 6, 1987.

Respondent was ordered to pay complainant, as reparation, $25,371.00 plus 13 percent interest thereon per annum from July 1, 1986, until paid.

CHARLES WETEGROVE CO. INC. v. VINCENT D. MAENZA d/b/a VINCENT MAENZA BANANA CO. a/t/a MAENZA & SONS. PACA Docket No. RD-87-164. Default Order issued March 27, 1987.

Respondent was ordered to pay complainant, as reparation, $3,578.75 plus 13 percent interest thereon per annum from June 1, 1986, until paid.

L&J MARKETING CO. v. RAVARINO PRODUCE CO., INC. PACA Docket No. RD-87-50. Order filed March 3, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 C.F.R. 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the proposed answer submitted by respondent is hereby ordered filed.

Copies of this order shall be served upon the parties. A copy of respondent's answer shall be served upon complainant along with this order.

[New docket number is PACA 2-7448.—Editor.]

RAIO PRODUCE COMPANY, INC. *v.* MUNCHY PRODUCE, INC. PACA Docket No. RD-86-471. Order issued March 3, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER DENYING PETITION TO REOPEN, VACATING STAY ORDER, REINSTATING DEFAULT ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Default Order was issued on October 21, 1986, awarding reparation to complainant in the amount of $573.75, plus interest. On November 20, 1986, respondent moved to reopen after default, claiming that it never received any documents to enable respondent to plead its case. On January 13, 1987, a Stay Order was issued, staying the Default Order.

Respondent's claim that it never received the complaint appears to be contradicted by a return receipt card in the file, signed and dated June 25, 1986, indicating respondent's receipt of the Department's June 18, 1986, letter serving the complaint. Respondent contends that the signature on the receipt card is not that of either of its two employees, Edward Munchick or Jean Latour, and asserts that its mail is often lost. While the signature on the return receipt card evidencing service of the complaint is hard to decipher, it is clearly not that of respondent's claimed two employees. However, the return receipt card evidencing receipt of the Department's October 22, 1986, letter serving the Default Order, signed and dated October 30, 1986, also bears the signature of someone other than Mr. Munchick or Mr. Latour, and respondent has not denied having received these documents. It is our conclusion that the return receipt card dated June 25, 1986, was signed for on behalf of respondent, and indicates that proper service was made.

Respondent has failed to show a "good reason" why the default should be reopened (7 C.F.R. § 47.25(e)). Respondent's motion to reopen after default is thus denied, the January 13, 1987, Stay Order is vacated, and the October 21, 1986, Default Order is reinstated. The amount awarded in the October 21, 1986, Default Order, plus interest, shall be paid within 30 days from the date of this Order.

Copies of this Order shall be served upon the parties.

STARR PRODUCE CO., INC. *v.* U.S. FOOD MARKETING, INC. PACA Docket No. RD-87-111. Order issued March 3, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $4,073.80 in connection with a transaction involving the shipment of mixed vegetables in interstate commerce.

A copy of the formal complaint was served on respondent. By telegram, received by the Department on February 3, 1987, complainant notified that it has settled its claim against respondent, and authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

PLANT QUARANTINE ACT

In re: HAWAIIAN AIRLINES, INC. and ROBERT T. YOSHIZUMI. P.Q. Docket No. 76. Decision and order filed February 6, 1987.

Boxes of fruit offered to a common carrier for shipment interstate from Hawaii—Not authorized by certificate or permit—Civil penalty.

Respondent offered to a common carrier two cardboard boxes containing 20 pounds of avocados and 13 pounds of star fruit for shipment from Hawaii to California. This was in violation of the regulations because movement of such articles was not authorized by a certificate or limited permit, as required Respondent was assessed a civil penalty of $500.

Jaru Ruley, for complainant.

Respondent, pro se.

Decision by Victor W. Palmer Administrative Law Judge.

DECISION AND ORDER AS TO HAWAIIAN AIRLINES, INC.

Preliminary Statement

This is an administrative proceeding pursuant to the Plant Quarantine Act, as amended (7 U.S.C. § 151 *et seq.*), and the regulations promulgated thereunder. The complaint, filed on March 29, 1985, alleged that the respondent , Hawaiian Airlines, Inc., offered to a common carrier two cardboard boxes containing 20 pounds of avocados and 13 pounds of star fruit for shipment from Honolulu, Hawaii, to San Francisco, California, in violation of section 318.13-3(a) of the regulations (7 C.F.R. § 318.13-3(a)) because movement of such articles was not authorized by a certificate or limited permit, as required. Respondent filed an answer on April 23, 1985, in which the allegations of the complaint were denied.

An oral hearing in this matter was conducted on November 4, 1986, at which the complainant was represented by Jaru Ruley, Esq., Office of General Counsel, United States Department of Agriculture, Washington, D.C. 20250-1400. The respondent was represented by David Glover, Director of Terminal Operations for Hawaiian Airlines, Inc., Honolulu, Hawaii.

Findings of Fact

1. Hawaiian Airlines, Inc., herein referred to as a respondent, is a corporation whose mailing address is P.O. Box 30008, Honolulu, Hawaii 96820.

2. On or about October 11, 1984, the respondent offered to a common carrier two cardboard boxes containing 20 pounds of avocados and 13 pounds of star fruit for shipment from Honolulu, Hawaii, to San Francisco, California, in violation of section 318.13-3 of the regulations (7 C.F.R. § 318.13-3) because movement of such articles was not authorized by a certificate of limited permit, as required.

Conclusion

Evidence presented at the hearing shows that on or about October 11, 1984, the respondent accepted two boxes, as baggage, in Hilo, Hawaii, for movement by its airplane to Honolulu, Hawaii, and transfer to Northwest Airlines for continued movement to San Francisco, California. The evidence further shows that after the respondent's airplane arrived in Honolulu, Hawaii, respondent placed the two boxes from the airplane on a cart with other baggage to be interlined, or transferred, to Northwest Airlines for the movement to California. An inspection of the boxes by a representative of complainant, prompted by the absence of stickers, certificates or limited permits, disclosed 20 pounds of avocados and 13 pounds of star fruits.

Regulations of the U.S. Department of Agriculture prohibit the movement interstate from Hawaii of baggage unless it has been offered for inspection to a Plant Protection and Quarantine Inspector of the Department as evidence d by a USDA sticker attached to it or, where regulated fruits or vegetables are involved, it has been authorized by a certificate or limited permit. Section 318.13-3 of the regulations (7 C.F.R. § 318.13-3) requires that the movement interstate of any regulated articles, e.g., avocados or star fruit, must be authorized by a certificate or limited permit. Additionally, 7 C.F.R. § 318.13-12 requires that all baggage destined for the continental United States from Hawaii be offered for inspection to an inspector of the Plant Protection and Quarantine Program of the Animal and Plant Health Inspection Service of the Department. Upon completion of such an inspection, the inspector will place a sticker on the inspected baggage.

Section 318.13-1(i) of the regulations (7 C.F.R. § 318.13-1(i) defines "moved," in pertinent part, as ". . . shipped, offered for shipment to a common carrier . . . directly, or indirectly, from Hawaii into or through the continental United States. . . ." It has been established that the respondent accepted the boxes for movement from Hilo to Honolulu, Hawaii, and completed baggage tickets showing that the boxes would go on to the continental United States, i.e., San Francisco, California. Upon arriving in Honolulu, Hawaii, the respondent placed the two uninspected boxes on a cart to be transferred to Northwest Airlines for the move to California. In placing the two uninspected boxes on the cart along with other baggage to be transferred to the Northwest Airlines flight to San Francisco, California, the respondent offered the baggage to a common carrier (Northwest Airlines) for movement from Hawaii to the continental United States.

Hawaiian Airlines has been made aware of the mechanisms, *i.e.*, certificates, limited permits, and USDA stickers, which the Department has instituted to alert the airlines that baggage has been cleared to move interstate from Hawaii. Hawaiian Airlines' acceptance and subsequent offer for shipment to Northwest Airlines of the two uninspected boxes

destined for San Francisco, California, was in violation of 7 C.F R § 318.13-3 because they were not accompanied by a certificate or limited permit. If Hawaiian Airlines had not accepted the two uninspected boxes for movement from Hawaii to the continental United States, this violation would not have occurred.

Upon consideration of the evidence in the record, I have concluded that Hawaiian Airlines, Inc., did fail to comply with the Act and the regulations thereunder. Complainant has requested that a civil penalty of seven hundred fifty dollar ($750 00) be assessed against the respondent.

It is clear that Hawaiian Airlines, Inc., was aware of its obligation to have procedures in place which would prevent passengers destined for the continental United States from getting baggage aboard its airlines without the required inspection. Several letters, informing airlines of their responsibilities in this regard, were introduced into evidence at the hearing. However, in light of the evidence presented that Hawaiian Airlines, Inc., did try to set up such a procedure, but that a passenger found some way to get around that screening procedure, an Order assessing a civil penalty of five hundred dollars ($500 00) will be entered.

Order

The respondent is hereby assessed a civil penalty of five hundred dollars ($500.00). The respondent shall send a certified check or money order for $500.00, payable to the "Treasurer of the United States," to U.S. Department of Agriculture, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota 55403 within thirty (30) days from the effective date of this order.

Pursuant to the Rules of Practice, this decision will become final without further proceedings 35 days after service hereof upon respondent unless appealed to the Judicial Officer within 30 days after service upon respondent , as provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties

[This decision and order became final March 24, 1987 —Editor.]

In re: RHIANNON JONES. P.Q. Docket No. 298. Order filed March 6, 1987.

Order issued by William J. Weber, Administrative Law Judge.

ORDER OF DISMISSAL

Complainant has filed a motion to dismiss on the grounds that prosecution is no longer warranted to accomplish the purposes of the Act.

IT SHOULD BE AND IS HEREBY ORDERED that the complaint is dismissed without prejudice.

LEE SMOOT

In re: CAMILLA PORTILLO. P.Q. Docket No. 299. Order filed March 31, 1987.

Order issued by Victor W. Palmer, Administrative Law Judge.

ORDER TO DISMISS COMPLAINT WITHOUT PREJUDICE

Upon motion of the Complainant and for good cause shown, the complaint herein is dismissed without prejudice.

In re: LEE SMOOT. P.Q. Docket No. 56. Order filed March 4, 1987.

Order issued by Edward H. McGrail, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

For good cause shown in complainant's motion, filed March 2, 1987, IT IS ORDERED, that the complaint issued in this matter on February 11, 1985, be, and hereby is, dismissed with prejudice.

In re: GRO-MORE OF MONROE, INC. USWA Docket No. 86-3. Decision and order filed January 29, 1987.

Failure to meet net assets (net worth) requirements—Permanent revocation of license—Default.

Jeffrey Kahn, for complainant.

Respondent, *pro se*

Decision issued by William J. Weber, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

Preliminary Statement

This is a proceeding under the United States Warehouse Act, as amended (the Act) (7 U.S.C. 241 *et seq.*), instituted by a complaint filed by the Acting Administrator, Agricultural Stabilization and Conservation Service (ASCS), United States Department of Agriculture, charging that the respondent willfully violated the Act and regulations promulgated thereunder (7 CFR 735-743).

Copies of the complaint and Rules of Practice (7 CFR 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by the Hearing Clerk by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

Findings of Fact

1. Gro-More of Monroe, Inc. is, and at all times material herein was, a North Carolina corporation which operates the Houston Elevator, a grain warehouse located at 1201 Zeb Helms Road, Monroe, North Carolina 28110.

2. During the period the respondent is alleged to have violated the Act it was licensed under the Act.

3. The regulations at 7 CFR 736.6 (d) provide that no person may be licensed as a warehouseman unless he has allowable net assets to the extent of at least $25,000 or 20 cents per bushel for the maximum number of bushels of grain storage capacity. Respondent's net assets reflected a negative net worth for the period ending September 30, 1985, based on the analysis of the financial statement.

4. On or about January 6, 1986, respondent was requested by mail to furnish the September 30, 1985, financial statement. By letter dated

January 27, 1986, respondent requested an extension of time to submit such statement. Request was granted and respondent was given until March 3 to submit the statement. Respondent was advised on or about March 28, 1986, by certified mail, that the company failed to meet net assets (net worth) requirements. Respondent did not claim this letter.

5. On or about May 30, 1986, by leased wire, the license was temporarily suspended for failure to meet financial requirements and pending further investigation of financial condition. The warehouseman was also advised that if corrective action was not completed and the licensing authority notified within 30 days of the date of the wire, action would be initiated to revoke the license. The warehouseman has failed to comply within the time allowed.

Conclusions

1. On September 30, 1986, the respondent was served a complaint filed by the Acting Administrator, ASCS, to permanently revoke respondent's license which was issued under the Act.

2. Respondent has failed to answer the complaint.

3. The regulations at 7 CFR 736.9 provide that a license issued to a warehouseman may be revoked, after an opportunity for a hearing, if the warehouseman has in any manner violated or failed to comply with any provisions of the Act or the regulations thereunder.

4. Pursuant to 7 U.S.C. 246, the violations alleged in paragraphs 1-5 of the Findings of Fact are grounds for the revocation of the U.S. Warehouse Act license issued to the respondent.

Order

1. The license issued under the Act to the respondent is hereby permanently revoked and any other license issued under the Act in which the respondent has any authority or financial interest is also revoked because of the violations as stated in paragraph 1-5 of the Findings of Fact and paragraphs 1-4 of the Conclusions, above.

2. The provisions of this order shall become effective on the first day after this decision becomes final. Copies hereof shall be served upon the parties.

3. Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days, unless appealed within 30 days, after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 CFR 1.130 *et seq.*).

[This decision and order became final March 11, 1987.—Editor.]